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156 79543 Sup. Ct

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945 44 47

No. 636 353

MURRAY WINTERS, APPELLANT,

vs.

THE PEOPLE OF THE STATE OF NEW YORK

APPEAL FROM THE COURT OF SPECIAL SESSIONS OF THE CITY OF NEW YORK, STATE OF NEW YORK

FILED DECEMBER 3, 1945.

SUPREME COURT OF THE UNITED STATES

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INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 31, 1946.

—2634

[fol. 1]

IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

PEOPLE OF THE STATE OF NEW YORK, Respondent,

against

MURRAY WINTERS, Defendant-Appellant

STATEMENT

On December 2nd, 1942 an information was filed accusing the above named defendant of violating Section 1141 of the Penal Law.

On December 9th, 1942 the defendant pleaded not guilty.

On January 19th, 1943 after trial the defendant was convicted of the violation of Subdivision 2 of Section 1141 of the Penal Law on Counts 4 and 5 of said information.

On January 27th, 1943 judgment of conviction was pronounced on the defendant and the defendant was sentenced to a fine of $100 or 30 days in the City Prison.

Gilbert S. Rosenthal appeared for the defendant on the trial, and Arthur N. Seiff appears for him on this appeal.

Hon. Frank S. Hogan, District Attorney, New York County, appeared for the People of the State of New York throughout the proceedings herein.

There has been no change of parties or attorneys, except as above stated.

[fol. 2] IN COURT OF SPECIAL SESSIONS OF THE CITY OF NEW YORK, COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, Complainant,

against

MURRAY WINTERS, Defendant

NOTICE OF APPEAL

SIRS:

Please Take Notice that the defendant herein hereby appeals to the Appellate Division of the Supreme Court in and for the First Department from the judgment of

conviction rendered against him in this Court on the 27th day of January 1943, of the crime of possessing with intent to sell magazines in violation of Subdivision 2 of Section 1141 of the Penal Law and fining him the sum of $100 or sentencing him to thirty days in default of payment of such fine, and that this appeal is from each and every part of said judgment of conviction as well as from the whole thereof, on both questions of law and fact.

Dated, New York, February 24th, 1943.

Yours, &c., Arthur N. Seiff, Attorney for Defendant, Office & P. O. Address, No. 570 7th Avenue, Borough of Manhattan, New York City.

[fol. 3] To: Clerk of Court of Special Sessions, New York County.

To: Hon. Frank A. Hogan, District Attorney, New York County.

IN COURT OF SPECIAL SESSIONS OF THE CITY OF NEW YORK, COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK

against

MURRAY WINTERS, Defendant

INFORMATION

Be It Remembered that I, Frank S. Hogan, the District Attorney of the County of New York, by this information, accuse the above-named defendant of the Crime of Unlawfully Possessing Obscene Prints, committed as follows:

The said defendant, on the 10th day of August, 1942, at the City of New York, in the County of New York, with intent to sell, lend, give away and show, unlawfully did have in his possession a certain obscene, lewd, lascivious, filthy, indecent and disgusting magazine and pamphlet entitled "Spotlight," whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

[fol. 4] Second Count

And I, the District Attorney aforesaid, by this information, further accuse the said defendant of the Crime of Unlawfully Possessing Obscene Prints, committed as follows:

The said defendant, on the day and in the year aforesaid, at the city and in the county aforesaid, with intent to sell, lend, give away and show, unlawfully did have in his possession a certain obscene, lewd, lascivious, filthy, indecent and disgusting magazine and pamphlet entitled "The Model Poses," whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

Third Count

And I, the District Attorney aforesaid, by this information, further accuse the said defendant of the Crime of Unlawfully Possessing Obscene Prints, committed as follows:

The said defendant, on the day and in the year aforesaid, at the city and in the county aforesaid, with intent to sell, lend, give away and show, unlawfully did have in his possession a certain obscene, lewd, lascivious, filthy, indecent and disgusting magazine and pamphlet entitled "Shadowless Figure Portraiture," whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

Fourth Count

And I, the District Attorney aforesaid, by this information, further accuse the said defendant of the Crime of Un-
[fol. 5] lawfully Possessing Obscene Prints, committed as follows:

The said defendant, on the day and in the year aforesaid, at the city and in the county aforesaid, with intent to sell, lend, give away and show, unlawfully did offer for sale and distribution, and have in his possession with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent and disgusting magazine entitled "Headquarters Detective, True Cases from the Police

Blotter, June 1940", the same being devoted to the publication and principally made up of criminal news, police reports, and accounts of criminal deeds, and pictures and stories of deeds of bloodshed, lust and crime.

Fifth Count

And I, the District Attorney aforesaid, by this information, further accuse the said defendant of the Crime of Unlawfully Possessing Obscene Prints, committed as follows:

The said defendant, on the day and in the year aforesaid, at the city and in the county aforesaid, with intent to sell, lend, give away and show, unlawfully did offer for sale and distribution, and have in his possession with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent and disgusting magazine entitled "Headquarters Detective, True Cases from the Police Blotter, June 1940", the same being devoted to the publication and principally made up of criminal news, police reports, and accounts of criminal deeds, and pictures and stories of deeds of bloodshed, lust and crime.

Frank S. Hogan, District Attorney.

[fol. 6] Endorsements on Information

Cal. No. 4229 4929

Court of Special Sessions of the City of New York, County of New York

The People

vs.

Murray Winters B

For Sentence

Information: Obscene Prints. Penal Law, Section 1141. Frank S. Hogan, District Attorney. W

Filed Dec 2 1942. Counsel, adjournments Jan 12—1943 Deft. Jan 19

Witnesses, Harry Kahan, 215 W. 22 St.; Off. Bischoff M W H. (See Exhibits in File Room D. A. O.)

Dec 9 1942 Cal. No. Paige
Defendant Pleads Not Guilty
[fol. 7] Jan 19 1943 Cal No. Cooper Flood Doyle.
On Trial, Defendant Acquitted as to Counts—1-2-and 3.
Flood J. Dissenting.
On Trial, Defendant Convicted as to Counts 4 and 5.
Defendant continued on Bail for Sentence Jan 27. Officer and Record Irving Ben Cooper. Fingerprint Attached.
Jan 27 1943 Cal. No. 6.
De Luca Cooper Flood
Motion to set aside Conviction and in Arrest of Judgment Denied.
$100 Fine or 30 Days City Prison. Paid.
Geo. B. De Luca, Presiding Justice.

Entered in Fine Book Page 150.

[fol. 8] IN COURT OF SPECIAL SESSIONS OF THE CITY OF NEW YORK, COUNTY OF NEW YORK

Present:—Hon. Cooper, Hon. Flood, Hon. Doyle, Justices

On a Charge of Vio. Penal Law Sec. 1141 (Obscene Prints)

THE PEOPLE OF THE STATE OF NEW YORK

vs.

MURRAY WINTERS

EXTRACT FROM CLERK'S MINUTES—January 19, 1943

I Do Certify that it appears from an examination of the Records of this office that Murray Winters the above-named defendant was on trial acquitted as to Counts 1, 2, and 3, Justice Flood dissenting. On trial, defendant convicted as to Counts 4 and 5, on January 19, 1943. Defendant sentenced to pay a fine of $100. or serve 30 vs City Prison by the Court of Special Sessions of The City of New York, on the 27th day of January 1943.

Jan 27, 1943: Motion to set aside Conviction and in arrest of judgment denied by Justices De Luca, Cooper and Flood.

A True Extract From the Minutes

Joseph F. Moss, Clerk of Court. (Seal.) J. C.

[fol. 9] In Court of Special Sessions of the City of New York, New York County, Part VI

Charge: Obscene Prints, Penal Law, Section 1141

The People of the State of New York

against

Murray Winters, Defendant

Transcript of Hearing

Tried at 100 Centre Street, New York, N. Y., January 19, 1943

Before Hon. Irving Ben Cooper, Presiding Justice, Hon. John V. Flood, Hon. Thomas F. Doyle, Associate Justices

Appearances:

For the People: James Fitzpatrick, Esq., Deputy Assistant District Attorney, 155 Leonard Street, New York, N. Y.

For Defendant: Gilbert S. Rosenthal, Esq., 366 Broadway, New York, N. Y.

Michael J. Michell, C. S. R., Official Stenographer.

[fol. 10] Court Clerk: No. 34, Murray Winters.

Harry Kahan, called as a witness on behalf of the People, being duly sworn, testifies as follows:

Direct examination.

By Mr. Fitzpatrick:

Q. What is your name?

A. Harry Kahan, agent, New York Society for the Suppression of Vice, 215 West 22nd Street, Borough of Manhattan.

Q. Now, Mr. Kahan, did you see the defendant on August 10, 1942?

A. I did.

Q. Will you state where you saw him and the circumstances under which you met him on that occasion. Tell the Court exactly what happened.

A. On August 10, 1942, about 4.00 P. M., I entered a store located at 712 Broadway, Borough of Manhattan, known as Wehman Brothers, and found this defendant in a store, in that store. I asked him whether he was the owner. He said "Yes." I asked him the name. He said, "My name is Murray Winters." I said, "Isn't your name Wishengrad?" He said, "No my name is Murray Winters." I looked around in the store. I was accompanied at that time by Lieutenant Warshower and Officer Bischoff. I looked around in the store and found on display——

Mr. Rosenthal: I object to that, if the Court pleases—"on display."

The Court: Objection is sustained.

Justice Cooper: What did you see?

The Witness: Various books, and among them a magazine known as "Spotlight," "The Model Poses," "Shadowless Figure Portraitures," and I asked him the price. He said, "The prices are on it." I said, "How much is it?" He said, "Spotlights are sold at ten cent a copy, Model [fol. 11] Poses at eighteen cents, and Shadowless Figure Portraitures at $1.65." A quantity of said Spotlight Figure Portraitures were found in the rear of the store covered with bags. They were seized by the police and taken to the Property Clerk's office. Also a quantity, about two thousand copies of Headquarter Detective magazines were found in the cellar; they were also seized by the police. Murray Winters was arrested and taken to the station house.

Q. I show you this booklet and ask you if you saw that in defendant's store on the day in question.

A. That's right.

Mr. Fitzpatrick: I offer this booklet in evidence as People's Exhibit 1.

Mr. Rosenthal: No objection.

Justice Cooper: No objection?

Mr. Rosenthal: No, your Honor.

Justice Cooper: It is received in evidence and physically marked People's Exhibit 1.

(The booklet referred to was admitted in evidence and marked People's Exhibit 1, of this date.)

Justice Cooper: Now, Mr. District Attorney, I would like to suggest, since it isn't clear to me, you might develop the approximate number of pamphlets similar to each one that you will offer in evidence, so that we get the clear picture as we go along.

Q. Now, Mr. Kahan, can you tell us how many copies of People's Exhibit 1 you saw in the defendant's premises on [fol. 12] the day of his arrest?

A. Two hundred and eighty-five.

Justice Cooper: Just where were they, Mr. Kahan? Now, remember we are talking about People's Exhibit 1 only right now.

The Witness: That's right. Two hundred eighty-five copies of Spotlight—no. What is that Spotlight? Of Spotlight. Pardon me. I want to correct that "of Spotlight."

Justice Cooper: Now, wait a minute. Take it easy. No one is rushing you. Wait a minute.

The Witness: One thousand——

Justice Cooper: Take a look at People's Exhibit 1.

The Witness: That's right.

Justice Cooper: Have you got it in front of you?

The Witness: That's right.

Justice Cooper: Now, approximately how many copies similar to People's Exhibit 1 were in the premises that you have described on the day that you went there?

The Witness: One thousand and twenty-eight copies.

Justice Cooper: And where were those 1,028?

The Witness: They were right in the store at 712 Broadway, on the shelf.

Justice Cooper: On the shelf?

The Witness: That's right.

Justice Cooper: All right.

Mr. District Attorney, will you hand that one up, please.

[fol. 13] Mr. Fitzpatrick: Yes, sir.

By Mr. Fitzpatrick:

Q. I show you another booklet and ask you if you saw that booklet in the defendant's premises.

A. I did.

Q. On the day in question?

A. I did.

Q. And let me have it, please.

Mr. Fitzpatrick: I offer in evidence as People's Exhibit 2 a booklet entitled "The Model Poses".

Mr. Rosenthal: No objection.

Justice Cooper: There being no objection, it will be received in evidence and marked People's Exhibit 2 in evidence.

(The booklet referred to was admitted in evidence and marked People's Exhibit 2, of this date.)

Q. Tell us, if you can, please, how many copies of People's Exhibit 2——

A. Eighty-six.

Q. ——you saw in the defendant's premises.

A. Eighty-six.

Q. And in what portion of the store, in what place were they?

A. Also in the store on a shelf in said premises located at 712 Broadway, in the Borough of Manhattan.

Q. I show you a magazine and ask you if you saw that magazine in the defendant's store on the day in question.

A. I did.

Mr. Fitzpatrick: I offer this magazine in evidence as People's Exhibit 3.

Mr. Rosenthal: Well, I notice various pencil marks on [fol. 14] this exhibit which I do not believe were on it at the time.

Justice Cooper: Your objection, then, is only as to the pencil marks?

Mr. Rosenthal: That's right, your Honor.

Justice Cooper: The offer of the District Attorney, I presume, is that magazine excluding the pencil marks.

Mr. Fitzpatrick: It is, sir.

Justice Cooper: Do you object to it in that form, in the form of that offer?

Mr. Rosenthal: We have a copy here, your Honor, which is exactly the same without any pencil marks.

Justice Cooper: Show it to the District Attorney.

Mr. Rosenthal: If the District Attorney would——

Justice Cooper: If he wishes to offer that one, it is up to him.

Mr. Rosenthal: Mr. Kahan gave it to me at the time of the arrest of the defendant and it has been in my possession ever since. It is exactly the same.

Mr. Fitzpatrick: As counsel has assured me that it is an exact copy, I will accept that assurance, your Honor.

Justice Cooper: So the prior offer is withdrawn, and in its place is the magazine offered to the District Attorney by counsel for the defendant, which the District Attorney now offers in evidence as People's Exhibit 3, is that right?

Mr. Fitzpatrick: That is correct.

Justice Cooper: Is that right, Mr. District Attorney?

[fol. 15] Mr. Fitzpatrick: That is correct.

Justice Cooper: And you have no objection to that, counsel?

Mr. Rosenthal: No, your Honor.

Justice Cooper: Received in evidence and physically marked People's Exhibit 3 in evidence.

(The magazine referred to was admitted in evidence and marked People's Exhibit 3, of this date.)

Q. Mr. Kahan, can you tell the Court how many copies of People's Exhibit 3 you saw or found in the defendant's premises on the day in question.

A. Two hundred eighty-five copies were found in said store, 712 Broadway, Borough of Manhattan, on a shelf, on an upper shelf of the rear of the store, covered with covers of some kind of a—bags, sacks, or something.

Q. Now, Mr. Kahan, did you find anything else in the premises?

A. I did.

Q. What was that?

A. Headquarter Detectives, two thousand copies, Headquarter Detectives.

Justice Cooper: I am sorry, Mr. District Attorney, how many copies did the witness testify as to People's Exhibit 3?

Mr. Fitzpatrick: Two hundred eighty-five.

Justice Cooper: All right, thank you.

Q. I show you this magazine and ask you if that is one of the magazines you found in the defendant's premises on the day in question.

A. That's right; yes.

[fol. 16] Mr. Fitzpatrick: Any objection to my offering that in evidence as People's Exhibit 4?

Mr. Rosenthal: (No answer.)

Q. Do you know, Mr. Kahan, whether or not there are any marks in the June issue of the magazine I have just exhibited to you? If you don't know, so state.

A. I don't know.

Mr. Fitzpatrick: He doesn't know.

Q. I show you another magazine, officer, and ask you if that is one magazine which you found in the premises of the defendant on the day in question.

A. That's right; that is the same.

Mr. Fitzpatrick: At this time, your Honor, I offer in evidence two magazines entitled "Headquarters Detective"; one is a June issue and one is an August issue, as People's Exhibits 4 and 5, exclusive of any markings which may be contained therein.

Mr. Rosenthal: No objection.

Justice Cooper: Any objection?

Mr. Rosenthal: No objection.

Justice Cooper: There being no objection, they will be so marked in evidence, People's Exhibits 4 and 5.

(The magazines referred to were admitted in evidence and marked People's Exhibits 4 and 5, respectively, of this date.)

Q. I show you People's Exhibit 4 in evidence and ask you how many copies of that issue you found in the defendant's premises on the day in question.

A. I don't know how many of said issue of Headquarter [fol. 17] Detectives were found, but I know that both issues of Headquarter Detectives, for the month of June and the other one, were found two thousand copies.

Q. That is People's Exhibits 4 and 5?

A. That's right.

Q. And where did you find them?

A. In the cellar of said premises located at 712 Broadway, Borough of Manhattan.

Q. Now, Mr. Kahan, did you personally have any conversation with the defendant in connection with People's Exhibits 1 to 5, inclusive, or any of them?

A. Yes, I did.

Q. What was the conversation or conversations?

A. I asked——

Q. Refer to the exhibits specifically, if you can.

A. Exhibit No. what? No. 1?

Q. No. 1 is——

Justice Cooper: Here you are. Show it to him, please.

Q. I show you People's Exhibit 1 and ask you if you had any conversation with the defendant in connection with that.

A. I asked the defendant whether they were for sale. He said, "Yes." I said, "How much?". He said, "Ten cents a copy."

Q. Any further conversation with him?

A. No.

Q. All right. Now, People's Exhibit 2, which I now show you, had you any conversation with the defendant in connection with that?

A. I did. I asked the defendant whether this Model Poses, the magazine, whether this was for sale. He said, "Yes." I asked him how much. He said, "Eighteen cents a copy."

Q. May I have it, please?

[fol. 18] Justice Cooper: By the way, does the District Attorney contend that anything in the literature—by that I mean the printed words—is objectionable, or does the District Attorney direct our attention to the photographs and only the photographs in these various exhibits?

Mr. Fitzpatrick: I direct the Court's attention to the photographs in those exhibits, which appear to be model magazines, so to speak, and I direct the Court's attention to the language in the Detective issues.

Justice Cooper: All right. Those are Exhibits 4 and 5.

Mr. Fitzpatrick: That is true.

Justice Cooper: All right.

Q. Now, in regard to People's Exhibits 3, 4 and 5——

Justice Cooper: Would you mind just asking him about 3, because we are putting 4 and 5 in a different category, because there you say you want us to read the literature or the printed matter, as well as to observe the pictures therein.

Q. Did you have any conversation with the defendant in connection with People's Exhibit 3, which I now show you?

A. I did.

Q. What was that conversation?

A. I asked him whether they were for sale. He said, "Yes". But this is not a copy that was taken in custody.

Q. You mean that is the one—it is the same as that; assume it is.

A. I see.

Q. Did you have any conversation with the defendant in connection with it?

A. I did.

[fol. 19] Q. What was that conversation?

A. I asked him how much they were for sale and he said the price $1.65.

Justice Cooper: Each?

The Witness: A copy.

Q. Now, Mr. Kahan, did you have any conversation with the defendant in connection with People's Exhibits 4 and 5?

A. I did.

Q. Which are the detective magazines?

A. I did.

Q. And what was that conversation or conversations?

A. I asked him whether they were for sale. He said, "Yes." "How much"? He said, "Fifteen cents a copy." He said, "What do you want to do with them?" I sa-d, "They will be seized by the police." He said, "Why do you have to seize them? I rather take them and destroy them myself. Leave them right here." Then the police took action and seized the 2,000 copies of said magazines, Headquarter magazines.

Justice Cooper: Don't drop your voice, Mr. Kahan. We don't get it. What did you say please?

The Witness: And the police seized two thousand copies of Headquarters magazine, June issue and the other issue.

Justice Cooper: All right.

Mr. Fitzpatrick: Your witness.

Cross-examination.

By Mr. Rosenthal:

Q. Now, Mr. Kahan, what time of day was it you walked into this store of Mr. Winters?

A. That was August 10, 1942.

Q. What time of the day?

A. Oh, about 4:00 P. M.

[fol. 20] Q. And this store is how large?

A. Oh, about 150 feet long or so; probably longer than that.

Q. About 150 feet long and about 30——

A. One hundred fifty or two hundred feet long.

Q. And about 30 to 35 feet wide, is it not?

A. About that.

Q. Now, none of these exhibits that you have introduced into evidence here today were exhibited in the window of the store, were they?

A. No, sir.

Q. And this store is stacked, is it not, from the floor right to the ceiling, from the front right to the back, with books, magazines, periodicals, various forms of literature?

A. That's right.

Q. Now, where in relation to the store itself did you find these Exhibits, People's Exhibits 1, 2 and 3?

A. One I found in the store as you enter, on the left-hand side; also referring to Exhibit No. 2; and No. 3 was found all the way in the rear of the store on the right-hand side, on the upper shelf covered with bags.

Q. And there were other things covered with bags there, weren't there?

A. Not as far as I know.

Q. Well, you looked through the store pretty thoroughly, didn't you, Mr. Kahan?

A. That's right.

Q. You looked into bins that were on the sides of the walls, didn't you?

A. That's right.

Q. And you saw other periodicals or other publications covered with bags to keep them clean, didn't you?

A. No, sir.

Q. You didn't. This is the only one, People's Exhibit 3, that you saw covered with burlap?

A. That's right.

Justice Doyle: Hold that up.

[fol. 21] Mr. Rosenthal: People's Exhibit 3.

Q. Now, Mr. Kahan, you remember testifying in the Magistrates' Court in this case, don't you?

A. I do.

Q. And do you recall that your testimony in the Magistrates' Court was that you found People's Exhibits 1, 2 and 3 in the rear portion of the store?

A. No, sir.

Q. Well, is that correct or isn't it correct, that they were in the rear portion of the store?

A. Not Exhibit 1 and 2 were not in the rear of the store.

Q. Now, the two hundred—the one thousand and some odd copies, 1,028 copies of People's Exhibit 1, was that in front of the store or the rear of the store?

A. It was right in the middle of the store, on the left-hand side, on a shelf.

Q. On a shelf?

A. That's right.

Q. And People's Exhibit 2, the 86 copies which you claim you found in the premises, where were they?

A. Were also about there.

Q. What?

A. Were also placed around that section.

Q. Now, this store has a partition in it, hasn't it?

A. That's right.

Q. A wooden partition?

A. That's right.

Q. And the front portion of the partition that faces the front of the store has shelving on it, hasn't it?

A. That's right.

Q. And the back part of the partition that faces the rear of the store also has shelving on it?

A. That's right.

Q. And these—that 1,028 copies of People's Exhibit 1, and the 86 copies of People's Exhibit 2, and the 285 copies of People's Exhibit 3 were within that partition facing the rear of the store, were they not?

A. No, sir.

[fol. 22] Q. Now, when you first testified, you told us that the—you told the District Attorney and the Court that you asked the defendant if they were for sale and he told you they were.

A. That's right.

Q. And you asked him the prices and he told you the prices were on them?

A. That's right.

Q. Now, when you first went into the store, didn't you identify yourself?

A. I did.

Q. And you told him who you were with?

A. That's right.

Q. And you didn't offer to purchase anything from the defendant, did you?

A. No, sir.

Q. And the defendant didn't offer to sell you anything, did he?

A. That was his answer when I asked him.

Q. I say, he didn't offer to sell you anything; you asked him if they are for sale?

A. That's right.

Q. And he told you the prices are on there?

A. Yes, and they are for sale.

Q. And they are for sale?

A. That's right.

Justice Doyle: But you had to open any one of these to see what was in the inside, didn't you?

The Witness: Yes, your Honor.

Justice Doyle: It was not open and displayed so that you could see the contents without taking it from the shelf and opening it?

The Witness: No, your Honor.

Q. Mr. Kahan, after you gave your direct testimony, the District Attorney then asked you some more questions about [fol. 23] prices and you gave us a price of ten cents on Spotlight, a price of 18 cents on People's Exhibit 2, Model Poses, and a price of $1.65 on People's Exhibit 3, Shadowless Figure Portraitures?

A. That's right.

Q. Those are not the prices that appear upon the volumes are they?

A. No, sir.

Q. And those prices the defendant told you were the wholesale prices which he sells them for?

A. I don't know.

Q. Well, didn't the defendant tell you that he does primarily a wholesale business?

A. He did not.

Q. Didn't discuss that with him at all?

A. No, sir.

Q. Now, you say you asked the defendant if his name wasn't Wishengrad?

A. That's right.

Q. You had never seen this defendant before, had you?

A. No, sir.

Q. And you had never known him by the name of Wishengrad, had you?

A. I did not.

Q. Now, isn't it a matter of fact, Mr. Kahan, that the conversation had with the defendant about whether his name was Wishengrad or Winters, or whatever it might be, was between Mr. Sumner and this defendant?

A. No, sir.

Q. And didn't this defendant tell Mr. Sumner that his name had been Wishengrad, and that it had been legally changed by the Court order to Winters?

A. I was not present at the said conversation, when the said conversation took place.

Mr. Rosenthal: Now, I ask that this book be marked Defendant's Exhibit A for identification.

Justice Cooper: Mark it Defendant's Exhibit A for identification.

[fol. 24] (The book referred to was marked Defendant's Exhibit A for identification, of this date.)

Q. Now, Mr. Kahan, I direct your attention to page 143 of the Defendant's Exhibit A for identification and ask you if in your opinion, that is lewd, licentious, obscene, lascivious or in anywise objectionable?

Mr. Fitzpatrick: I object to that question, your Honor. That calls for the opinion of the witness. I think that the matter should be passed upon by the Court, not the witness.

Justice Cooper: Well, Mr. District Attorney, speaking for myself, I wonder whether or not it is nevertheless admissible, for us to accept, agree with, or reject, as we see fit.

In other words, I think that we can at least listen to what the reaction of this witness may be to a given picture. We are not bound by it.

Mr. Fitzpatrick: I will withdraw the objection.

Justice Cooper: I don't know how my colleagues feel.

Justice Doyle: I think the very nature of his job itself is supposed to make him an expert on those matters.

Justice Cooper: We will take it. We will take it.

Mr. Fitzpatrick: If your Honors please, another point occurs to me. The picture is not in evidence.

Justice Cooper: That's right. That is another ground [fol. 25] for an objection, if he isn't offering it to us. He is merely asking this man to pass upon a picture. It will be worthless, of course, but if he wants to do it that way, it is up to him. Of course, the triers of the facts have seen nothing of that particular exhibit. I guess he knows it. He has been trial counsel for quite a while. He knows what he is doing.

The Witness: What is your question?

Justice Cooper: He asked you whether you regard that picture as objectionable in the same respect that you found the exhibits already introduced on behalf of the People objectionable.

The Witness: I do.

Justice Cooper: He said he does.

All right.

By Mr. Rosenthal:

Q. Now, I show you page 163 of the Defendant's Exhibit A for identification and ask you if you find that picture objectionable.

A. No, sir.

Justice Cooper: Has that been marked?

Mr. Rosenthal: It is the same book.

Justice Cooper: All right. You gave the page number. Go ahead.

Q. Now, I show you page 241 of the Defendant's Exhibit A for identification and ask you if you find that objectionable.

A. No, sir.

Q. Now, Mr. Kahan, you attended the World's Fair, didn't you?

A. Yes.

Q. And you have heard of an artist by the name of Watteau, haven't you?

A. Yes.

Q. Now, I show you page 173 of the Defendant's Exhibit A for identification and ask you if the picture appearing on the bottom or to your left is, in your opinion, objectionable.

A. No, sir.

[fol. 26] Q. And what about the picture appearing on the right?

A. No, sir.

Q. In your opinion they are not objectionable?

A. No, sir.

Q. So that the only picture that I have shown you in this Defendant's Exhibit A that, in your opinion, is objectionable is the one appearing on page 143?

A. That's right.

Q. Is that correct?

Mr. Rosenthal: Now, at this time, if the Court pleases, I offer Defendant's Exhibit A for identification into evidence. It is a collection of the masterpieces of the New York World's Fair, Official Illustrated Catalog.

Mr. Fitzpatrick: I have no objection to the book being offered in evidence, if the particular pages are marked so that your Honors can see which the——

Mr. Rosenthal: Yes.

Justice Cooper: Really, the only one—you have already called the pages to our attention.

Mr. Rosenthal: 143, 163, 241 and 173.

Justice Cooper: All right. Now, with that understanding, it will be received, limited to those pages.

Mr. Rosenthal: That is correct.

Justice Cooper: Is that all right, Mr. District Attorney?

Mr. Fitzpatrick: Yes, your Honor.

(The pages referred to of Defendant's Exhibit A for identification, were admitted in evidence and marked Defendant's Exhibit A, of this date.)

[fol. 27] Justice Cooper: Now, go to something else. We have got that.

Mr. Rosenthal: The one on page 163 is the one I believe he said was objectionable, was it not?

The Witness: 143 was.

Q. Now, Mr. Kahan, you have heard of Bridgeman Publishers, Inc., haven't you?

A. No, sir.

Q. Of Pelham, New York?

A. No, sir.

Q. Did you ever hear of the Bridgeman Art Books?

A. No, sir.

Q. Did you ever hear of the Book of One Hundred Figure Drawings?

A. No, sir.

Q. Did you ever hear of The Female Form, by Ben Pinchot?

Mr. Fitzpatrick: I object to these questions.

Justice Cooper: Yes. I think we have heard enough along that line. There was a certain latitude we really allowed. Strictly speaking, it should be confined to the publications taken at that time; and I think you have gone far enough along those lines.

Mr. Rosenthal: All right.

Q. Now, Mr. Kahan, you have heard of the Franklin Square Agency, a division of Harper Brothers, haven't you, a periodical agency?

A. I did.

Q. And you know they publish a catalog, seasonal catalog, setting forth the various periodicals for sale?

Mr. Fitzpatrick: I object, your Honor.

A. Yes.

[fol. 28] Mr. Fitzpatrick: There is no relevancy between the issues here and the catalog.

Justice Cooper: I don't know yet.

Mr. Rosenthal: I merely want to show that Headquarters Detective is sold generally and is advertised for sale.

Justice Cooper: Sustained.

Mr. Rosenthal: Exception.

Justice Cooper: Mark it for identification.

Mr. Rosenthal: Yes. May I have page 52 marked for identification.

(The page referred to was marked Defendant's Exhibit B for identification, of this date.)

Q. Now, Mr. Kahan, in respect to People's Exhibits 4 and 5, they were tied in bundles of about one hundred or two hundred in a bundle, weren't they?

A. Yes.

Q. And they were lying in the basement of the premises occupied by the defendant?

A. That's right.

Q. And there were various other periodicals and books and magazines tied up and lying there also, weren't there?

A. That's right.

Q. Probably hundreds of thousands?

A. Well, I don't know how many.

Q. Well, thousands at least?

A. That's right.

Q. And the same is true there—there is a sub-basement there, is there not?

A. That's right.

Q. And you found the same condition there?

A. That's right.

Q. Surplus stock or unsalable stock or things in storage?

A. That's right.

[fol. 29] Q. And when you asked the defendant about it and you told him that you were going to seize it, he said, "Why seize it? I'll destroy it."

A. That's right.

Q. Is that correct? Now, you have nothing in your complaint, have you, Mr. Kahan, about the defendant stating that, what the price was of People's Exhibits 4 and 5?

Mr. Fitzpatrick: I object to that question, your Honor. It isn't necessary for the witness to put evidence in his complaint."

Justice Cooper: Well, strictly speaking, Mr. District Attorney, you are right, I, in my humble opinion, believe; but we will allow it on the matter of veracity only.

Have you anything like that in the complaint?

The Witness: If your Honor will allow me.

Justice Cooper: Certainly. You have a right to examine the complaint.

Do you tell us there is not?

Mr. Rosenthal: There is not; and Mr. Kahan went through the same procedure in the Magistrates' Court, if your Honor allows it.

Justice Cooper: I don't see much——

Mr. Rosenthal: No, except that the prices of the others are listed.

The Witness: That's right, your Honor.

Justice Cooper: That particular one is not listed; which could be very well called to our attention by way of argument, rather than by question and answer.

Mr. Rosenthal: That is all.

[fol. 30] Mr. Fitzpatrick: I have no further witnesses, your Honor. The People's case.

Justice Cooper: Motions, please.

Motion to Dismiss

Mr. Rosenthal: Now, at this time, if the Court pleases, the defendant moves to dismiss the first count of the information——

Justice Cooper: Papers, Mr. District Attorney.

Mr. Rosenthal: —which concerns the Spotlight magazine——

Justice Cooper: Just wait a second.

May we have No. 3, please?

Mr. Rosenthal: I have another copy.

Justice Cooper: We have it. It is all right.

All right, counsel. I understand that you wish to address yourself to each count separately——

Mr. Rosenthal: I think it would be best.

Justice Cooper: —and make the same motion as to each count.

Mr. Rosenthal: That is correct.

Justice Cooper: The Court has already conferred, anticipating that that would be your motion, and we have examined these magazines in question, and examined the law in connection therewith, and we are now ready to render our opinion, rather our decision, on each count, so as to obviate the necessity of your repeating it as to each one.

Mr. Rosenthal: Thank you, your Honor.

Justice Cooper: We will consider that it has been separately made as to each count, that there is no *prima-facie* case made out by the People.

[fol. 31] As to Count No. 1, dealing with the magazine Spotlight, by a majority of the Court your motion is granted, and Mr. Justice Flood dissents.

As to Count No. 2, dealing with the magazine The Model Poses, your motion is granted; Mr. Justice Flood dissents.

As to the third count, dealing with Shadowless Figure Portraiture, by a majority of the Court your motion is granted, Mr. Justice Flood dissents.

Before going on to the fourth count, I should like to say, speaking for myself, that the opinions by the Court of Appeals of magazines that I have examined, and as I recall, are even more offensive, if that term can be used, than what is illustrated in People's Exhibits 1, 2 and 3, regardless of my personal opinion, and I may very well feel that those are objectionable, but my interpretation of the Court of Appeals' ruling prompted me to decide these first three counts in the manner that I have discussed.

Now, as to the fourth count, dealing with the magazine——

Mr. Rosenthal: Headquarters Detective.

Justice Cooper: —Headquarters Detective, that is denied by the entire bench; and as to the fifth count, dealing also with Headquarters Detective magazine, that is likewise unanimously denied.

Mr. Rosenthal: Might I ask at this time, your Honor—I haven't the information in front of me; I examined it before, though—on the Exhibits 4 and 5, are the People proceeding [fol. 32] under subdivision 1 or subdivision 2 of Section 1141?

Justice Cooper: They are evidently proceeding under No. 2, because that is the language that appears in the statute, subdivision 2. Am I right, Mr. District Attorney?

Mr. Fitzpatrick: It appears from the memorandum I have in front of me that subdivision 2 is the subdivision.

Mr. Rosenthal: Would your Honor hear *be* at greater length on the question of subdivision 2?

Justice Cooper: All right.

Mr. Rosenthal: I made a research into the cases decided under this section and could find no cases or no cited cases under subdivision 2. In my humble opinion, that subdivision is clearly unconstitutional, and I say it for this reason; that if you follow the letter of the law, a case-book used in law school in criminal law, which is a book composed primarily of crime or stories of crime or articles concerning crime, would be banned by this subdivision.

Justice Doyle: You claim that our New York criminal law library then would——

Mr. Rosenthal: If you follow the letter of the law, I say to you that every detective thriller, every detective story that has been written, these crime and mystery stories that

are published and sold throughout the land, can be banned by this section, if you follow that section; and that the various Western stories, biff-bang boys, Dead-eye Dick shoots four Indians, all the Nick Carter stories which I [fol. 33] read as a boy, and I imagine some of the members on this bench read; even Horatio Alger with some of his blood and thunder.

Justice Cooper: As far as I am concerned, you are treading on safer ground when you speak of Horatio Alger. I'll tell you how much I think of Horatio Alger. I really feel that while it is not literature, it has done a great deal to inculcate in boys as they grew up some of the very fine copy-books maxims. But I certainly think that is a far cry from the lurid, crazy material that makes up People's Exhibits 4 and 5.

Justice Doyle: We know so many Horatios on our bench, too, you know.

Mr. Rosenthal: That I know.

Might I say this with respect to People's Exhibits 4 and 5: I happen to know—not with respect to this particular magazine, but in general—how these magazines are created. They are written primarily and practically entirely by either newspaper men or retired newspaper men. The facts are obtained from files of the various police courts or the various newspaper clips, and it is a rehashing and a rewriting of things that have been in public print.

Now, I can't see where a limitation of the sort that is attempted to be set forth in subdivision 2 is constitutional, because if you follow it to its logical conclusion, every book, every magazine that deals with bloodshed or lust or things of that sort, and deals with nothing else—I mean, the average detective story, it deals with a crime, sometimes there [fol. 34] is killing in it, sometimes there are three or four or five killings in it; The Bat, the play The Bat——

Justice Cooper: It is not the killings *per se*; Mr. Rosenthal; it is the manner in which — is treated and handled and set up in the magazine—the typography, and the language used to depict these crimes—that we feel brings it within the prohibition of subdivision 2 of the section involved; and that, of course, is our judgment; we may be in error.

Mr. Rosenthal: I understand.

Justice Cooper: But we know the arguments that are always advanced, and we have examined those exhibits particularly to decide whether from our point of view they

do offend within the meaning of that subdivision, and we have decided that they do as a *prima-facie* case.

Mr. Rosenthal: I understand.

May I have an exception to your Honors' ruling on the motion.

Justice Cooper: Certainly. Certainly.

[fol. 35] Murray Winters, called as a witness in his own behalf, being duly sworn, testifies as follows:

Direct examination.

By Mr. Rosenthal:

Q. What is your name?

A. Murray Winters.

Q. Where do you live?

A. 4410 Broadway, Manhattan.

Q. Mr. Winters, your name was formerly Murray Wishengrad?

A. That's right.

Q. And you had it legally changed to Murray Winters?

A. Yes, sir.

Q. Do you know the exact date of that?

A. I believe it was in 1937.

Q. By Court order?

A. That's right.

Q. Now——

Justice Cooper: Excuse me, Mr. Rosenthal. I have no idea to curtail you, but just get down to 4 and 5.

Q. Now, Mr. Winters, People's Exhibits 4 and 5, the Headquarters Detective magazines, Mr. Kahan has testified were tied in bundles of 150 or 200 and were in the basement of the premises, is that correct?

A. Yes, sir.

Q. Now, did you ever—how long had you had those magazines lying there?

A. At least two years; approximately two years.

Justice Cooper: Go ahead.

Q. Did you tell Mr. Kahan that they were for sale?

A. No, sir.

Q. Did you ever tell him that they were ten cents or fifteen cents a copy?

A. I don't recall that.

Q. Well, did you or didn't you?

A. I believe I didn't.

[fol. 36] Justice Cooper: You believe you did not?

The Witness: I did not.

Q. And where had you purchased these magazines?

A. A part of a lot of magazines that came in, a part of another lot.

Justice Cooper: He just asked you where did you purchase these, referring to People's Exhibits 4 and 5.

The Witness: They were purchased from a dealer, who offered these along with others.

Justice Cooper: Will you give us the name, please. Where, he asked. From whom? Is that what you asked?

Mr. Rosenthal: Yes.

The Witness: Well, the——

Q. Do you remember the name of the dealer?

A. His name was Ginsberg.

Q. And that was approximately two years ago, you say?

A. That's right.

Q. And they had been in your cellar ever since?

A. That's right.

Q. You didn't offer to sell these to Mr. Kahan or to anyone else, did you?

A. I did not.

Justice Cooper: What did you have them in your cellar for?

The Witness: Well, we took them along with these and others; we had to take the lot.

Justice Cooper: You bought them?

The Witness: It was just a job.

Justice Cooper: A job lot?

[fol. 37] The Witness: So many. Here they are and you take them all.

Justice Cooper: Well, do you say that you have never sold any magazines similar to People's Exhibits 4 and 5; I mean copies of any of those particular——

The Witness: As far as we were concerned, they were unsalable.

Justice Cooper: Well, did you have them there to sell?

The Witness: They were on the premises, but we couldn't sell them.

Justice Cooper: All right.

By Mr. Rosenthal:

Q. And who discovered these magazines, Mr. Kahan or Mr. Sumner?

A. Mr. Sumner.

Q. And was there any conversation between you and Mr. Sumner or between Sumner and Mr. Kahan in your presence?

A. Well, Mr. Sumner, as I recall, picked one up and said, "What are you doing with these?" I said, "Well, what is wrong with those?" He said, "They are on Mr. LaGuardia's list of——"

Q. Banned magazines?

A. "—banned publications." I said, "Well, if that is the case, I will destroy them."

Justice Cooper: I am awfully glad that that came out after we denied the motion, otherwise——

Mr. Rosenthal: It wouldn't have influenced the Court in any way, I know.

Justice Cooper: There is talk about being guided by the edicts of the Mayor.

All right. Go ahead.

[fol. 38] Mr. Rosenthal: I know your Honors to be fair and fearless, regardless of edicts.

Q. And you said if that is the case, you would destroy them?

A. I said, "I did not know that. If that is the case, I will destroy them." And Mr. Sumner didn't seem to say anything about that, and Mr. Kahan says, "No, we will take them."

Q. And they took them?

A. And they took them.

Mr. Rosenthal: That is all.

Q. Well, just to give the Court an idea, how large is your store?

A. Approximately 135 feet deep by about 25 feet wide.

Q. Now, you have the store and you have a sub-basement, a basement, rather?

A. And a sub-basement.

Q. And they are all the same size as the store?

A. Approximately.

Q. And they are all filled with books, magazines, periodicals?

A. Yes, sir.

Justice Doyle: Were you ever convicted of any crime?

The Witness: Yes, sir.

Justice Doyle: What?

The Witness: In or approximately ten or eleven years ago, the charge was selling obscene printed matter.

Justice Cooper: And you were convicted or did you plead guilty to it.

The Witness: Yes, sir.

Justice Cooper: All right. Anything else?

Mr. Rosenthal: That is all, sir.

[fol. 39] Cross-examination.

By Mr. Fitzpatrick:

Q. Have you ever been convicted of any other crime?

A. No, sir.

Q. How long were you engaged in business at the premises where you were arrested? How long were you engaged in business at the premises where you were arrested?

A. Let's see; about five years.

Q. How old are you?

A. Thirty-two.

Q. Are you married?

A. Yes, sir.

Q. What is your classification number in the draft?

A. 3-A, sir.

Q. Isn't it a fact that People's Exhibits 4 and 5 were available for sale?

A. They were not offered for sale, sir; they were on the premises.

Justice Cooper: He said "were available for sale."

The Witness: They were on the premises, but they were not——

Q. Would you have sold them if someone had ordered a copy of either People's Exhibit 4 or 5?

Mr. Rosenthal: That is objected to, if the Court pleases.

The Court: Sustained.

Mr. Fitzpatrick: No further questions, your Honor.

Mr. Rosenthal: I just want to ask two questions in view of what the District Attorney developed.

Redirect examination.

By Mr. Rosenthal:

Q: This business is operated by whom, Mr. Winters?

A. It is a partnership; my brother and myself are the sole owners.

Q. And is your brother actively engaged in the business [fol. 40] at present?

A. He happens to be in the armed services at present.

Q. How long has he been in the armed services?

A. Since July of this year, or 1942.

Q. And your business is also the publication of a well-known joke book known as Wehman Brothers Joke Book?

A. And other publications.

Q. You actually publish those, don't you?

A. That's right.

Recross-examination.

By Mr. Fitzpatrick:

Q. Have you any employees at that shop?

A. Well, we did have until the other day. We have a shipping clerk.

Q. You are in full charge and control of this store?

A. Yes, sir.

Q. You were in full charge of the store on the day of your arrest?

A. Yes, sir.

Mr. Fitzpatrick: That is all.

Mr. Rosenthal: That is the defendant's case. The defendant rests.

Renewal of Motion to Dismiss

At this time, if the Court pleases, I renew the motion made at the close of the People's case, and upon the further ground that we now have affirmatively from the defendant that there was no sale, no offer to sell. The exhibits in ques-

tion were in the cellar, tied in bundles; they weren't even on the store premises.

Justice Cooper: As to Counts 4 and 5—and that is what your motion is addressed to at this time?

Mr. Rosenthal: Yes, your Honor.

Justice Cooper: —motion is denied——

[fol. 41] Mr. Rosenthal: Exception.

Justice Cooper: —and the defendant is found guilty of Counts 4 and 5. Officer and record for sentence January 27.

Mr. Rosenthal: Bail continued, your Honor?

Justice Cooper: Bail continued.

Mr. Rosenthal: Your Honor, I loaned the People my exhibit, Exhibit 3. He has been acquitted on the count involving that exhibit.

Justice Cooper: So what do you want?

Mr. Rosenthal: May it be returned to me?

Justice Cooper: Certainly. I don't think the District Attorney wants it. Do you, Mr. District Attorney? He has been acquitted by a majority vote anyhow.

Mr. Rosenthal: And Defendant's Exhibit A, which also applied only to counts 1, 2 and 3.

Justice Cooper: Have you got everything you want, now?

Mr. Rosenthal: Yes, your Honor, everything but a complete acquittal.

Justice Cooper: You did a pretty good job. You came very close on 1, 2 and 3.

(Case closed.)

[fol. 42] IN COURT OF SPECIAL SESSIONS OF THE CITY OF NEW YORK, NEW YORK COUNTY

Part VI

Charge: Obscene Prints, Penal Law, Section 1141

THE PEOPLE OF THE STATE OF NEW YORK,

against

MURRAY WINTERS, Defendant

SENTENCE

Sentenced at 100 Centre Street,
New York, New York,
January 27, 1943.

Before Hon. George B. DeLuca, Presiding Justice; Hon. John V. Flood, Hon. Irving Ben Cooper, Associate Justices

APPEARANCES:

For the People: Thomas J. McNamee, Esq., Deputy Assistant District Attorney, 155 Leonard Street, New York, N. Y.

For Defendant: Gilbert S. Rosenthal, Esq., 366 Broadway, New York, N. Y.

Court Clerk: No. 6, Murray Winters!

Justice DeLuca: Yes, counsellor.

Mr. Rosenthal: First, for the purposes of the record, may I make a motion in arrest of judgment as to the convictions on Counts 4 and 5 upon the ground that the infor-
[fol. 43] mation does not state a crime; and upon the further ground that subdivision 2 of section 1141 is unconstitutional.

The Court: Denied.

Mr. Rosenthal: Exception.

Now, in respect to the case itself, two of the members of this bench were part of the trial bench.

Justice DeLuca: That's right.

Mr. Rosenthal: The counts upon which the defendant was convicted concerned two back issues of a magazine known as Headquarters Detective, of which he had, I

believe, two thousand issues tied up in bundles in the basement. The testimony of the defendant was that he had purchased these as a job lot along with several thousand other magazines; and that he had sold the others, hadn't sold these, and had practically abandoned them.

The defendant has a place of business at 712 Broadway, and the primary business of his firm consists of the publication of joke books and, for instance, this Wehman Brothers Easy Method for Learning Spanish, How to Play Chess, and various pulp publications. He is the publisher of them. He is in business with his brother. It is a partnership. The brother is now in the United States Army. He has a prior conviction in 1932, I believe, which he admitted.

Justice DeLuca: Nineteen thirty-two, yes.

Mr. Rosenthal: Which he admitted to on the stand, and which occurred at a time when he was working for someone else before he was in business for himself.

I disagreed with the Court at the time on the question of law, and I believe that was what was solely involved here, was a question of law as to whether or not these magazines [fol. 44] came within section 1141; and whether or not section 1141, subdivision 2, was constitutional.

These magazines, as a matter of fact, are still sold today on the new-stands of the City of New York, Headquarters Detective—I mean the same—I don't know the contents, but the same magazine, published by the same firm; and, in fact, up until, I believe, two months ago had mailing privileges. Two months ago the United States postal authorities revised their mailing-privilege principles and took it away from this magazine; at least, so I have been informed.

I might say this, that his business is not one of a retail business; I mean, although he has a store, I don't think his retail business averages three per cent of his actual business, I have gone over that with his accountants and I am satisfied to that effect, or I wouldn't make the statement to the Court.

Justice Flood: Have we any copies of those magazines handy?

Court Clerk: I can get them for you, Judge. They are upstairs in the Clerk's office.

Justice DeLuca: We have to call it again. I wasn't on the trial. I would like to look at them and see how vicious they are, or indecent.

Mr. Rosenthal: Well, they were typical detective-story magazines; I mean, in my opinion.

Justice DeLuca: That doesn't tell me anything regarding indecency.

Mr. Rosenthal: They are a re-hashing of cases where people have been arrested.

Justice DeLuca: Well, you don't mind waiting a little while?

Mr. Rosenthal: No, your Honor.

Justice DeLuca: We will call it again.

* * * * * * * *

Court Clerk: No. 6, Murray Winters!

[fol. 45] Mr. Rosenthal: My argument, your Honor, is that under that section the case books we used in law school to study criminal law would be barred, or Sherlock Holmes, or Van Dine detective stories, Wild West magazines. The Court disagreed with me, however.

Justice Flood: I should say the legislature disagreed.

Mr. Rosenthal: I mean the Court disagreed with me on the question of whether it was constitutional.

I want to correct an impression I may have left when I said the defendant's business was primarily wholesale. I meant in the publishing and selling of these magazines that are published by Wehman Brothers, the firm that he owns, such as How to Play Chess, An Easy Method for Learning Spanish, Book on Pidgeons.

Justice Flood: I assumed that is what you meant, because you said that this was one of the job lots that was there in storage.

Mr. Rosenthal: Yes, sir.

Justice DeLuca: Well, we think that the magazine comes within the subdivision——

Mr. Rosenthal: I understand.

Justice DeLuca: —within the prohibition of the subdivision. Whether or not it is constitutional is another matter.

All right. The judgment of the Court is the defendant pay a fine of One hundred (100) Dollars or stand committed for Thirty (30) Days.

Mr. Rosenthal: Thank you.

* * * * * * * *

I hereby certify that the foregoing is a true and correct transcript of the within proceedings as reported by me.
Michael J. Mickell, C. S. R., Official Stenographer.

[fol. 46] In Supreme Court of New York, Appellate Division, First Department

People of the State of New York, Respondent,
against
Murray Winters, Defendant-Appellant

Stipulation as to Exhibits

Subject to the Approval of This Court:

It is hereby stipulated and agreed by and between the undersigned that People's Exhibits 1, 2, and 3 and Defendant-Appellant's Exhibit A which relate to the first three counts of the Information as to which the defendant was acquitted need not be printed, and that People's Exhibits 4 and 5, and Defendant-Appellant's exhibit B for identification which consists of voluminous printed matter, being magazines and a catalogue need not be printed, but that People's Exhibits 4 and 5, and Defendant-Appellant's Exhibit B for identification be submitted to the Court on the argument or submission of this appeal.

Dated, New York City, July 19th, 1943.

Frank S. Hogan, District Attorney, N. Y. County, for Richard G. Deuzer, Deputy Assistant, District Attorney for Respondent. Arthur Seiff, Attorney for Defendant-Appellant.

So ordered J. M. C.

[fol. 47] Affidavit of No Opinion

State of New York,
County of New York, ss:

Arthur N. Seiff, being duly sworn, deposes and says: I am the attorney for the defendant-appellant herein and am familiar with all the facts and proceedings had. No opinion was rendered by any of the trial justices herein on

the rendition of the judgment of conviction, except as hereinbefore set forth.

Arthur N. Seiff.

Sworn to before me this 3d day of September, 1943, Milton S. Ward, Attorney and Counsellor-at-Law, P. O. Ad. 570—7th Ave., N. Y. C. Residing in Bronx County; Bx. Co. Clk's No. 6; N. Y. Co. Clk's No. 35; Commission expires March 30, 1945.

[fol. 48] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 49] In Court of Special Sessions of the City of New York, County of New York

The People of the State of New York, Complainant,

against

Murray Winters, Defendant

Notice of Appeal to Court of Appeals

Sirs:

Please take notice that pursuant to leave granted by an order and certificate dated June 8th, 1944 issued pursuant to Section 520 of the Code of Criminal Procedure, the above named defendant hereby appeals to the Court of Appeals from an order and judgment of the Appellate Division of the Supreme Court, First Department, dated May 19th, 1944, affirming a judgment of the Court of Special Sessions of the City of New York, County of New York, rendered January 27th, 1943 convicting the above named defendant of the crime of possessing with intent to sell magazines in violation of Subdivision 2 of Section 1141 of the Penal Law, and fining him the sum of $100 or sentencing him to thirty days in default of payment of such fine, and from [fol. 50] each and every part of said order an judgment of affirmance, as well as from the whole thereof.

Dated, New York, June 8th, 1944.

Yours, &c., Arthur N. Seiff, Attorney for Defendant, Office & P. O. Address, No. 570 7th Avenue, Borough of Manhattan, New York City.

To Clerk of Court of Special Sessions, New York City.

To Hon. Frank A. Hogan, District Attorney, New York County.

[fol. 51] In Supreme Court of New York, Appellant Division, First Department

People of the State of New York, Respondent,

against

Murray Winters, Defendant-Appellant

Order Granting Leave to Appeal

An application in the above entitled proceeding having been made to me, one of the Justices of the Appellate Division of the Supreme Court, First Department, under Section 520, subdivision 3, of the Code of Criminal Procedure for leave to appeal to the Court of Appeals from the order of affirmance entered in the office of the Clerk of this Court on May 19th, 1944,

Now, on reading the annexed affidavit of Arthur N. Seiff, attorney for the defendant-appellant, and it appearing to me that a question of law is involved which ought to be reviewed by the Court of Appeals, permission is hereby granted to the said defendant-appellant to appeal to the Court of Appeals.

Albert Cohn, Justice of the Appellate Division of the Supreme Court, First Department.

June 8th, 1944.

[fol. 52] In Supreme Court of New York, Appellate Division, First Department

Present: Hon. Francis Martin, Presiding Justice, Hon. Alfred H. Townley, Hon. Edward J. Glennon, Hon. Edward S. Dore, Hon. Albert Cohn, Justices.

14150

People of the State of New York, Respondent

vs.

Murray Winters, Appellant

Order of Affirmance on Appeal from Judgment - May 19, 1944

An appeal having been taken to this Court by the defendant from a judgment of the Court of Special Sessions of the City of New York, County of New York, rendered on the

27th day of January, 1943, and said appeal having been argued by Mr. Arthur N. Seiff of counsel for the appellant, and by Mr. Alan J. Elliot of counsel for the respondent, and a brief having been filed by Mr. Emanuel Redfield of counsel for New York City Committee of the American Civil Liberties Union, as *amicus curiae;* and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed.

Enter. F. M.

[fol. 53] In Supreme Court of New York, Appellate Division, First Department, March, 1944

Francis Martin, P. J.; Alfred H. Townley, Edward J. Glennon, Edward S. Dore, Albert Cohn, JJ.

14150

People of the State of New York, Respondent

vs.

Murray Winters, Appellant

Appeal from a judgment of the Court of Special Sessions of the City of New York, County of New York, convicting defendant of the crime of possessing with intent to sell magazines in violation of Subdivision 2 of Section 1141 of the Penal Law. Arthur N. Seiff for appellant.

Alan J. Elliot of counsel (Stanley H. Fuld with him on the brief; Frank S. Hogan, District Attorney) for respondent.

Emanuel Redfield of counsel (Osmond K. Fraenkel, attorney) for New York City Committee, American Civil Liberties Union as *Amicus Curiae.*

Opinion

[fol. 54] Cohn, J.:

Defendant, a book dealer, found in possession of a large number of magazines which purported to contain true cases of crimes from police records and files, was convicted in the

Court of Special Sessions of the City of New York of a violation of Subdivision 2 of Section 1141 of the Penal Law.

The statute reads as follows:

> "A Person * * * who * * *
>
> 2. Prints, utters, publishes, sells, lends, gives away, distributes or shows, or has in his possession with intent to sell, lend, give away, distribute or show, or otherwise offers for sale, loan, gift or distribution, any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime; * * *
>
> * * * * * * *
>
> Is guilty of a misdemeanor * * *."

Upon the evidence submitted at the trial, there was a sufficient showing that defendant had in his possession the magazines with intent to sell. As the information charges, the magazines are, without doubt, "devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime". They contain a collection of crime stories which portray in vivid fashion [fol. 55] tales of vice, murder and intrigue. The stories are embellished with pictures of fiendish and gruesome crimes, and are besprinkled with lurid photographs of victims and perpetrators. Featured articles bear such titles as "Bargains in Bodies", "Girl Slave to a Love Cult", and "Girls' Reformatory"; these suggest the pattern of the literature.

That such publications tend to demoralize the minds of their more impressionable readers cannot be doubted. The statute which is aimed at restraining the publication and sale of such printed matter, we think, is a legitimate exercise of the police power of the state in that it is designed to promote the general welfare and to protect the morals of the community (*People* v. *Gitlow*, 234 N. Y. 132, 137, affirmed *Gitlow* v. *New York*, 268 U. S. 652). A similar statute was upheld by the Supreme Court of Errors of the State of Connecticut upon the ground that publications devoted wholly or mainly to lawless deeds of

bloodshed, lustful or lascivious conduct are "calculated to induce, especially among the young, the immoralities they are thus incited to dwell upon, and so to endanger the public morals" (*State* v. *McKee*, 73 Conn. 18, 26, 46 Atl. 409, 412).

Upon the same principle, it has been held in other jurisdictions, that a state may forbid the publication of details of an execution of death for crime (*State* v. *Pioneer Press Co.*, 100 Minn. 173, 110 N. W. 867) or the publication of scandal, and stories of immoral conduct (*Williams* v. *State*, 130 Miss. 827, 94 So. 882; *In re Banks*, 56 Kan. 242, 42 Pac. 693, 694; *State* v. *Van Wye*, 136 Mo. 227, 37 S. W. 938; [fol. 56] *Commonwealth* v. *Herald Pub. Co.*, 128 Ky. 424, 108 S. W. 892).

The statute here involved condemns the sale and printing of books, pamphlets, magazines and newspaper-, which are "devoted to the publication and principally made up of" pictures and stor-es of deeds of bloodshed, lust or crime. Publications dealing with crime news as an incident to the legitimate purposes of science or literature are not prohibited. Moreover, as the prosecution readily concedes, the statute does not seek to suppress "a large class of recognized literature including practically all detectives and western stories and books". It is aimed exclusively at printed matter which presents tales of bloodshed, crime or lust in a manner that would have a tendency to demoralize its readers and would be likely to corrupt the morals of the young and lead them to immoral acts.

Defendant urges that the law under which he was convicted is unconstitutional in that it violates the State Bill of Rights (Art. 1, Section 8) and the Fourteenth Amendment of the Federal Constitution.

The State Constitution (Art. 1, Section 8) provides in part:

> "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."

The freedom of speech and of the press, which is secured by such a constitutional guaranty, does not imply complete [fol. 57] exemption from responsibility for everything a citizen may say or publish. Indeed, the state Bill of Rights

expressly provides that a person exercising the freedom is responsible for the abuse of that right.

Pursuant to the police power and without abridging freedom of the press, the state may enact reasonable regulations in order to protect the general welfare, public safety and order and public morals. In *People* v. *Gitlow*, *supra*, the Court of Appeals (at p. 137) said:

> "While the right to publish is thus sanctioned and secured, the abuse of that right is excepted from the protection of the Constitution, and authority to provide for and punish such abuse is left to the Legislature. The punishment of those who publish articles which tend to corrupt morals, induce crime or destroy organized society, is essential to the security of freedom and stability of the state. While all the agencies of government, executive, legislative and judicial, cannot abridge the freedom of the press, the Legislature may control and the courts may punish the licentiousness of the press."

In *People* v. *Most*, 171 N. Y. 423, the court said (p. 431):

> "The Constitution does not protect a publisher from the consequences of a crime committed by the act of publication. It does not shield a printed attack on private character, for the same section from which the above quotation is taken expressly sanctions crimi- [fol. 58] nal prosecution for libel. It does not permit the advertisement of lotteries, for the next section prohibits lotteries and the sale of lottery tickets. It does not permit the publication of blasphemous or obscene articles as the authorities uniformly hold. (*People* v. *Ruggles*, 8 Johns. 290, 297; *People* v. *Muller*, 96 N. Y. 408; *In re Rapier*, 143 U. S. 110.) It places no restraint upon the power of the legislature to punish the publication of matter which is injurious to society according to the standard of the common law. It does not deprive the state of the primary right of self-preservation. . . . ."

By the due process clause of the Fourteenth Amendment of the Federal Constitution, it is provided:

> "nor shall any State deprive any person of life, liberty, or property, without due process of law."

It is now well settled that freedom of the press, like freedom of speech, is a fundamental public right and that the due process clause of the Fourteenth Amendment may make it unlawful for a State to abridge by its statutes freedom of the press which the First Amendment safeguards against encroachment by Congress. (*Thornhill* v. *Alabama*, 310 U. S. 88, 95; *Lovell* v. *Griffin*, 303 U. S. 444, 450; *Grosjean* v. *American Press Co.*, 297 U. S. 233, 244; *Palko* v. *Connecticut*, 302 U. S. 319, 324.) However, it is equally well settled that this constitutional guaranty of freedom of speech and of the press does not deprive the State of [fol. 59] its police power to enact laws in the legitimate exercise of the police power. (*Gitlow* v. *New York*, 268 U. S. 652, 666, 667; *Stromberg* v. *California*, 283 U. S. 357, 359, 368, 369.) In *Near* v. *Minnesota*, 283 U. S. 697, the Supreme Court reiterated the principle in the following language by Chief Justice Hughes (p. 707):

> "It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action. It was found impossible to conclude that this essential personal liberty of the citizen was left unprotected by the general guaranty of fundamental rights of person and property. * * * In maintaining this guaranty, the authority of the state to enact laws to promote the health, safety, morals and general welfare of its people is necessarily admitted. The limits of this sovereign power must always be determined with appropriate regard to the particular subject of its exercise. * * * Liberty of speech, and of the press, is also not an absolute right, and the state may punish its abuse."

Accordingly, we conclude that the statute challenged is valid, that its enactment is a legitimate exercise of the police power of the State, and that it is not violative of the State or the Federal Constitution.

The judgment of conviction should be affirmed.

All Concur.

[fol. 60] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 61] IN THE COURT OF APPEALS OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK, Respondent,

against

MURRAY WINTERS, Appellant-Defendant

REMITTITUR—July 19, 1945

Be it remembered that on the 25th day of July, in the year of our Lord 1944, Murray Winters, the appellant in this cause, came hereunto the Court of Appeals by Arthur N. Seiff his attorney, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department.

And the People etc. the respondent in said cause, afterwards appeared in said Court of Appeals by Frank S. Hogan, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon the said Court of Appeals having heard this cause argued by Arthur N. Seiff, of counsel for the appellant, and by Alan J. Elliot, of counsel for the respondent, brief filed by amici curiae, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court, appealed from herein be and the same hereby is affirmed.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Court of Special Sessions of the City of New York, there to be proceeded upon according to law.

And afterwards, to wit on the 11th day of October, 1945, an order was duly made amending the remittitur herein, a certified copy of which order is hereto attached and made [fol. 62] a part hereof.

Therefore, it is considered that the said judgment be affirmed as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid such judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted unto the Court of Special Sessions of the City of New York, before the Justices thereof according to the form of the statute in such case made and

provided, to be enforced according to law, and which record now remains in the said Court of Special Sessions.

John Ludden, Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS,
Clerk's Office, Albany: July 19, 1945.

I hereby certify, that the preceeding record contains a correct transcript of the proceedings in said cause in the Court of Appeals with the papers originally filed thereunder, attached thereto.

John Ludden, Clerk. (Seal.)

[fol. 63] IN COURT OF APPEALS OF NEW YORK

Present, Hon. John T. Loughran, Chief Judge, Presiding.

PEOPLE OF THE STATE OF NEW YORK, Respondent,

vs.

MURRAY WINTERS, Appellant.

ORDER AMENDING REMITTITUR—October 11, 1945

A motion to amend the remittitur in the above cause having heretofore been made herein upon the part of the appellant, papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, that the said motion be and the same hereby is granted and the remittitur amended by adding thereto the following:

> Upon this appeal there was presented and necessarily passed upon a question under the Constitution of the United States, viz: The defendant argued that his conviction violated the right of freedom of speech guaranteed by the Fourteenth Amendment of the Constitution of the United States. This Court held that the conviction aforesaid did not violate the right of freedom of speech guaranteed by the Fourteenth Amendment of the Constitution of the United States.

And, the Court of Special Sessions of the City of New York, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

John T. Loughran, Chief Judge. (Seal.)

[fol. 64] In Court of Appeals of New York

The People of the State of New York, Respondent, et al,

v.

Murray Winters, Appellant

Decided—July 19, 1945

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the first judicial department, from a judgment of said court, entered May 19, 1944, which unanimously affirmed a judgment of the Court of Special Sessions of the City of New York, New York County (Cooper, P. J., Flood and Doyle, JJ.), convicting defendant of the crime of unlawfully possessing, with intent to sell, printed paper devoted to accounts of deeds of bloodshed, lust or crime, in violation of subdivision 2 of section 1141 of the Penal Law.

Arthur N. Seiff for appellant.

Emanuel Redfield and Osmond K. Fraenkel for New York City Committee of American Civil Liberties Union, *amicus curiae*, in support of appellant's position.

Sidney R. Fleisher for Authors' League of America, Inc. *amicus curiae*, in support of appellant's position.

Frank S. Hogan, District Attorney (Alan J. Elliot and Whitman Knapp of counsel), for respondent.

Opinion

Loughran, J.:

After trial in the Court of Special Sessions of the City of New York, the defendant was convicted upon charges that he had possessed certain printed materials with intent to sell them, contrary to Penal Law, article 106, section 1141, subdivision 2. The Appellate Division affirmed and the justice who wrote its opinion gave the defendant leave to present the case to us.

The relevant words of section 1141 are these: "A person * * * who * * * 2. Prints, utters, publishes, sells, lends, gives away, distributes or shows or has in his possession with intent to sell, lend, give away, distribute or show, or otherwise offers for sale, loan, gift or distribution, any book, pamphlet, magazine, newspaper or other printed

paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal [fol. 65] deeds, or pictures or stories of deeds of bloodshed, lust or crime * * * is guilty of a misdemeanor * * *." Numerous copies of magazines composed entirely of such pictures and stories were found on the occasion in question in the bookshop of the defendant.

Defense counsel takes the above text at its full literal meaning. "The statute (he says) makes no distinction between truth, fiction and statistics. All come within its condemnation equally, provided they consist of 'criminal news' or 'police reports' or 'accounts of criminal deeds.'" From his viewpoint the statute "condemns any publication devoted to and principally made up of criminal news or police reports or accounts of criminal deeds regardless of the manner of treatment." This conception—which would outlaw all commentaries on crime from detective tales to scientific treatises—may, we think, be dismissed at once on the short ground that its manifest injustice and absurdity were never intended by the Legislature. (See *Crooks v. Harrelson*, 282 U. S. 55.) On the other hand, we are to heed the rule which tells us to read a statutory text in accordance with the general subject matter of which it is a part. (See *Matter of Rouss*, 221 N. Y. 81, 91; *Matter of Kaplan v. Peyser*, 273 N. Y. 147.)

In this instance the general subject matter constitutes Penal Law, article 106, the caption of which is "Indecency." The above text forms subdivision 2 of section 1141 of article 106. The caption of section 1141 is "Obscene prints and articles." Indecency and obscenity are not and never have been technical terms of the law and hence we are without any full or rigorous definition of the uses made thereof in the administration of justice. To be sure, our statutes dealing with indecent or obscene publications have generally been held to speak of that form of immorality which has relation to sexual impurity. (*People v. Muller*, 96 N. Y. 408; *Swearington v. United States*, 161 U. S. 446.) Such [fol. 66] indeed is the way this court has read subdivision 1 of section 1141 of the Penal Law. (*People v. Eastman*, 188 N. Y. 478.) But to limit the above words of subdivision 2 of section 1141 to that restricted meaning would be to reduce that subdivision to an unnecessary partial reduplication of subdivision 1. Since our respect for the Legislature is enough to keep us away from that interpretation, we move

along to the question of the validity of the broader scope of subdivision 2. From this point on, that subdivision will be called the statute.

Indecency or obscenity is an offense against the public order. (9 Halsbury's Laws of England (1st ed.), 530, 538; Harris & Wilshire's Criminal Law (17th ed.) 216; 1 Bishop's Criminal Law (9th ed.) 500, 504.) Collections of pictures or stories of criminal deeds of bloodshed or lust unquestionably can be so massed as to become vehicles for inciting violent and depraved crimes against the person and in that case such publications are indecent or obscene in an admissible sense, though not necessarily in the sense of being calculated or intended to excite sexual passion. This idea, as it seems to us, was the principal reason for the enactment of the statute. (Cf. *Magon v. United States*, 248 F. 201, certiorari denied, 249 U. S. 618; *Foy Productions Ltd. v. Graves*, 278 N. Y. 498.)

There is, as we are also persuaded, ample warrant in the evidence for the finding that the magazines which were taken from the defendant's premises were obnoxious to the statute. The 2,000 copies he kept there were tied up in small bundles that were suitable for delivery to distributors. There is proof of an admission by the defendant of his readiness to sell single copies indiscriminately. The contents are nothing but stories and pictures of criminal deeds of bloodshed and lust. The Appellate Division said: "The stories are embellished with pictures of fiendish and [fol. 67] gruesome crimes, and besprinkled with lurid photographs of victims and perpetrators. Featured articles bear such titles as 'Bargains in Bodies,' 'Girl Slave to a Love Cult' and 'Girls Reformatory.'" It is not suggested that any of the contributors was distinguished by his place in the literary world or by the quality of his style. (Cf. *Halsey v. New York Society*, 234, N. Y. 1.) In short, we have here before us accumulations of details of heinous wrongdoing which plainly carried an appeal to that portion of the public who (as many recent records remind us) are disposed to take to vice for its own sake. Whether the statute extends to accounts of criminal deeds not characterized by bloodshed or lust is a question that does not here arise. (See *United States v. Limehouse*, 285 U. S. 424; *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 576; *People v. Sanger*, 222 N. Y. 192).

We pass now to the defendant's contention that the statute is unconstitutional because the criterion of criminal liability thereunder is "a personal taste standard, uncertain, indefinite and *ex post facto* in its practical operation." In the nature of things there can be no more precise test of written indecency or obscenity than the continuing and changeable experience of the community as to what types of books are likely to bring about the corruption of public morals or other analogous injury to the public order. Consequently, a question as to whether a particular publication is indecent or obscene in that sense is a question of the times which must be determined as matter of fact, unless the appearances are thought to be necessarily harmless from the standpoint of public order or morality. (See *People v. Pesky*, 254 N. Y. 373; *People v. Wendling*, 258 N. Y. 451; *People v. Streep*, 264 N. Y. 666; *People v. Berg*, 269 N. Y. 514; *People v. Fellerman*, 269 N. Y. 629; *People v. Brewer*, 272 N. Y. 442; *Foy Productions Ltd. v. Graves*, 278 N. Y. 498; *People v. Osher*, 280 N. Y. 793.) Never has this perception been more forcefully expressed than in this [fol. 68] sentence by Cardozo, J.: "Law accepts as the pattern of its justice the morality of the community whose conduct it assumes to regulate." (Paradoxes of Legal Science, 37.) The constitutional validity of that standard has long been established. (*United States v. Rosen*, 161 U. S. 29.) (See *United States v. Rebhuhn*, 109 F. 2d 512, 514; *Magon v. United States*, 248 F. 201, certiorari denied 249 U. S. 618.)

Under the statute, as the defendant sees it, "publication of any crime book or magazine would be hazardous." For reasons that have already been stated, we believe this assertion to be an exaggeration; but the point is of little account in any event, since "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree." (*Nash v. United States*, 229 U. S. 373, 377.) A recent illustration comes readily to hand: An occupier of land who by his use of it does an unreasonable injury to his neighbor's property can be held to answer therefor, though he may have been guilty of no more than an error of judgment. (*Dixon v. New York Trap Rock Corp.* 293 N. Y. 509.) So when reasonable men may fairly classify a publication as necessarily or naturally indecent or obscene, a mistaken

view by the publisher as to its character or tendency is immaterial.

In anticipation perhaps of what we have already said, the defendant lastly argues for a fresh conception of freedom of the press under which the heretofore accepted requirements of decency would no longer be operative against obscene publications. We see no immediate necessity for announcing so radical a departure from the collective reasoning of our ancestors, a position whereof we think ourselves to be assured by the following words of the highest court in the land: "Allowing the broadest scope to the lan- [fol. 69] guage and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise a constitutional problem. These include the lewd and obscene, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." (Chaplinsky v. New Hampshire, 315 U. S. 568, 571-572. See the cases there cited and 2 Cooley on Constitutional Limitations (8th ed.), 886, 1328.)

The judgment should be affirmed.

Dissenting Opinion

Lehman, Ch. J., (dissenting):

I dissent on the ground that the statute, as construed by the court, is so vague and indefinite as to permit punishment of the fair use of freedom of speech. (*Stromberg v. California*, 283 U. S. 359.) Though statutes directed against "obscenity" and "indecency" are not too vague when limited by judicial definition, they may be too vague when not so limited. (See *McJunkins v. State*, 10 Ind. 140; *Jennings v. State*, 16 Ind. 335.) It is the function of the Legis-

lature to define the kind of conduct which is harmful from the standpoint of public order or morality and should be prohibited. Then the question whether the conduct of a defendant falls within that definition may be one of fact. The morality of the community does not, however, become the standard of permissible conduct until the Legislature has embodied its conception of that morality in a regulatory statute.

[fol. 70] Judgment should be reversed.

Lewis, Conway, Desmond, Thacher and Dye, JJ., concur with Loughran, J., Lehman, Ch. J., dissents in opinion.

Judgment affirmed.

[fol. 71] In Court of Special Sessions of City of New York

Judgment on Remittitur—July 27, 1945

Endorsement on Original Information

Judgment of this Court affirmed by Court of Appeals. Judgment of Court of Appeals made judgment of this Court.

William R. Bayes, Presiding Justice.

[fol. 72] In the Supreme Court of the United States

People of the State of New York, Appellee,

against

Murray Winters, Defendant-Appellant

Petition for Appeal

To the Chief Judge of the Court of Appeals of the State of New York:

Your petitioner, Murray Winters, by Arthur N. Seiff, his attorney, appellant in the above action, respectfully shows:

This prosecution was brought in a Court of Special Sessions of the City of New York, New York County, against the defendant petitioner charging him with a vio-

lation of Section 1141 Penal Law. The information against him based on sub. 1 was dismissed. He was convicted under sub. 2. Upon the trial the defendant urged that Section 1141, sub. 2 was unconstitutional under the Federal constitution in that it abridged the freedom of publication and that it was indefinite and uncertain. That challenge was overruled by the trial court. A subsequent appeal to the Appellate Division, First Department, based on the challenged invalidity of the statute resulted in an affirmance on May 19, 1944. An appeal was taken to the Court of Appeals. On July 19, 1945 that Court affirmed the conviction by a divided vote, the Chief Judge voting for reversal on the ground that the statute was unconstitutional. It ordered by its remittitur that the record in said Court be remitted to the Court of Special Sessions to be proceeded upon according to law.

Thereafter on the 27th day of July, 1945, the said Court of Special Sessions made and entered in the office of the [fol. 73] Clerk of said Court a final judgment making the judgment of the Court of Appeals the judgment of said Court of Special Sessions.

In accordance with Section 237 (a) of the Judicial Code, and in accordance with the Rules of the Supreme Court of the United States, your petitioner respectfully shows this Court that the cause is one in which under legislation in force when the Act of January 31, 1928 was passed, to wit, under Section 237 (a) of the Judicial Code, a review could be had in the Supreme Court of the United States by appeal, as a matter of right.

The defendant at all stages of the prosecution challenged the validity of the statute under which he was charged as being repugnant to the Federal constitution. The decision of the Court of Appeals, being the highest Court in which a decision in this prosecution can be had, held that the statute was not repugnant as challenged and was valid.

The errors upon which petitioner claims to be entitled to an appeal are more fully set forth in the assignment of errors filed herewith pursuant to Rules 9 and 46 of the Rules of the Supreme Court of the United States, and there is likewise filed herewith a statement as to the jurisdiction of the Supreme Court of the United States as provided by Rules 12 and 46 of the Rules of the Supreme Court of the United States.

Wherefore, your petitioner prays for an allowance of an appeal from the Court of Special Sessions of the City of New York, County of New York, which has possession of the record of all proceedings herein and wherein was entered said final judgment affirming the conviction, to the Supreme Court of the United States entered pursuant thereto in order that said decision of the Court of Appeals and of the judgment of the Court of Special Sessions entered pursuant thereto may be examined and reversed, and also [fol. 74] prays that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Court of Special Sessions, aforesaid, under his hand, and seal of said Court may be sent to the Supreme Court of the United States as provided by law, and that an order be made touching the security required of the petitioner, and that the bond tendered by the petitioner be approved.

Dated: August 27, 1945.

Murray Winters, by Arthur N. Seiff, Attorney for Defendant-Appellant, Office & P. O. Address 60 Wall Street, Borough of Manhattan, City of New York.

[fol. 75] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENTS OF ERROR

The appellant above named assigns the following errors in the record of proceedings in this cause:

The Court of Appeals of the State of New York erred:

1. In holding that Section 1141 sub. 2 Penal Law of the State of New York does not deprive appellant of his liberty without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

2. In refusing to hold that the said statute violates appellant's rights of freedom of speech and press under the Fourteenth Amendment of the Constitution of the United States.

3. In refusing to hold that the said statute as applied to appellant denies him his rights of freedom of speech and press under the Fourteenth Amendment of the Constitution of the United States.

4. In refusing to hold that the said statute is so indefinite and uncertain as to deny appellant his liberty without due process of law under the Fourteenth Amendment of the Constitution of the United States.

5. In refusing to hold that the magazines possessed by the appellant were not a clear and imminent danger to the welfare of persons in the City of New York where they were possessed.

[fol. 76] 6. In refusing to hold that the publication possessed by appellant was not a clear and imminent danger to readers of them.

Wherefore, on account of the errors hereinabove assigned, appellant prays that said judgment of the Court of Special Sessions of the City of New York, County of New York, dated July 27, 1945 be reversed and judgment entered in favor of appellant.

Dated: New York, —— —, ——.

Murray Winters, by Arthur N. Seiff, Attorney for Appellant, Office & P. O. Address, 60 Wall Street, Borough of Manhattan, City of New York.

[fol. 77] In the Supreme Court of the United States

[Title omitted]

Order Allowing Appeal

The petition of Murray Winters, the appellant in the above entitled cause, for an appeal in the above cause to the Supreme Court of the United States from the judgment of the Court of Special Sessions of the City of New York, County of New York, having been filed with the Clerk of this Court and presented herein, accompanied by assignments of error and statement as to jurisdiction, all as provided by Rule 46 of the Rules of the Supreme Court of the United States, and the record in this cause having been considered, it is hereby

Ordered that an appeal be and it is hereby allowed to the Supreme Court of the United States from the final judgment dated the 27th day of July, 1945 of the Court of Special Sessions of the City of New York, County of New

York, as prayed in said petition, and that the Clerk of the Court of Special Sessions of the City of New York, County of New York, shall within forty (40) days from this date, make, and transmit to the Supreme Court of the United States under his hand and seal of said Court a true copy of the material parts of the record herein, which shall be designated by praecipe or stipulation of the parties or their counsel herein, all in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

It is further Ordered that the appellee having waived the filing of a bond for security for costs, the furnishing of [fol. 78] same is hereby dispensed with.

Dated: September —, 1945.

——, Chief Judge of the Court of Appeals of the State of New York.

[fol. 79] In the Supreme Court of the United States

[Title omitted]

Stipulation Waiving Bond

It Is Hereby Stipulated and Consented by the attorney for the Appellee that the furnishing of a bond by Appellant as security for costs on his appeal to the Supreme Court of the United States, as required by the Rules of the Supreme Court of the United States, is hereby waived, and that an order dispensing with same may be granted without further notice.

Dated: August 22, 1945.

Frank S. Hogan, District Att'y per Richard G. Deuzer, A. D. A. Attorney for Appellee.

[fols. 80-82] Citation in usual form showing service omitted in printing.

[fol. 83] In the Supreme Court of the United States

[Title omitted]

Stipulation as to Exhibits

It Is Hereby Stipulated and Agreed by and between the undersigned that People's Exhibits 1, 2 and 3, and defendant-appellant's Exhibit A, which relate to the first three

counts of the Information as to which the defendant was acquitted, need not be printed, and that People's Exhibits 4 and 5 and defendant-appellant's Exhibit B for identification which consist of voluminous printed matter being magazines and a catalog, need not be printed but may be submitted to the Court on the argument or submission of this appeal.

Dated: New York, New York, November 15, 1945.

Frank S. Hogan, District Attorney, by Whitman Knapp. Arthur N. Seiff, Attorney for Defendant-Appellant.

[fol. 84] In the Supreme Court of the United States

[Title omitted]

Stipulation as to Transcript of Record

It Is Hereby Stipulated and Agreed by and between counsel for the respective parties hereto, that the following are the necessary papers in this action to be included in the transcript of the record to be certified and filed with the Clerk of the Supreme Court of the United States:

1) The entire record in the Court of Appeals.
2) Remittitur of the Court of Appeals dated July 19, 1945, and its amendment.
3) Opinion of the Court of Appeals.
4) Judgment of the Court of Special Sessions dated July 27, 1945.
5) Petition for an allowance of appeal.
6) Assignment of Errors.
7) Order allowing appeal.
8) Stipulation waiving filing of a bond for security for costs.
9) Statement under Rule 12 of the Rules of the Supreme Court of the United States.
10) Proof of service of Petition for appeal, Assignment of Errors, Statement under Rule 12, and Order allowing appeal, together with a statement calling appellee's attention to paragraph 3 of Rule 12.

11) Citation on appeal with proof of service.
12) Stipulation as to Exhibits.
13) This stipulation.

Dated: New York, New York, November 15, 1945.

Frank S. Hogan, District Attorney by Whitman Knapp. Arthur N. Seiff, Attorney for Defendant-Appellant.

[fol. 85] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 86] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF RECORD—Filed December 5, 1945

Comes now appellant pursuant to Paragraph 9 of Rule 13 of the Rules of this Court and adopting his Assignment of Errors as his Statement of Points to be relied upon, and represents that the whole of the record, as filed, is necessary for the consideration of said points.

Dated: New York, New York, Nov. 15, 1945.

Arthur N. Seiff, Attorney for Defendant-Appellant. Office & P. O. Address, 60 Wall Street, Borough of Manhattan, City of New York.

Service of a copy of the foregoing is acknowledged this day of November 15, 1945.

Frank S. Hogan, District Attorney, New York County, by Whitman Knapp.

[fol. 86a] [File endorsement omitted.]

[fol. 87] SUPREME COURT OF THE UNITED STATES

ORDER POSTPONING FURTHER CONSIDERATION OF THE QUESTION OF JURISDICTION—January 2, 1946

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of the jurisdiction of this Court is postponed to the hearing of the case on the merits.

Mr. Justice Jackson took no part in the consideration of this question.

Endorsed on Cover: File No. 50,339. New York. Court of Special Sessions of the City of New York. Term No. 636. Murray Winters, Appellant, vs. The People of the State of New York. Filed December 3, 1945. Term No. 636 O. T. 1945.

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. [redacted] 33 3

MURRAY WINTERS,

Appellant,

vs.

THE PEOPLE OF THE STATE OF NEW YORK

APPEAL FROM THE COURT OF SPECIAL SESSIONS OF THE CITY OF NEW YORK, STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

ARTHUR N. SEIFF,
Counsel for Appellant.

INDEX

Subject Index

Statutes Cited

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 636

THE PEOPLE OF THE STATE OF NEW YORK,
Appellee,
against
MURRAY WINTERS,
Defendant-Appellant

Pursuant to Rule 12 of the Rules of the Supreme Court of the United States, the above appellant files this separate statement particularly disclosing the basis upon which it is contended the Supreme Court of the United States has jurisdiction upon appeal to review the judgment of conviction appealed from herein, as follows:

The jurisdiction of this Court is invoked under Section 237 (a) of the Judicial Code as amended by the Act of January 1, 1938 (28 U. S. C. A., Sections 861 (a) and 861 (b)), since this is a cause wherein a final judgment has been rendered or passed upon by the highest court of a State in which a decision could be had where is drawn in question the validity of a State statute on the ground that it is repugnant to the Constitution of the United States.

The date of the judgment of the Court of Appeals of the State of New York is July 19, 1945, and of the Court

of Special Sessions, July 27, 1945. The date upon which application for appeal is presented is August 2, 1945.

The State law whose validity is involved is Section 1141, sub. 2 of the Penal Law of the State of New York which reads as follows:

> "A person * * * who * * *
> 2. Prints, utters, publishes, sells, lends, gives away, distributes or shows, or has in his possession with intent to sell, lend, give away, distribute or show, or otherwise offers for sale, loan, gift or distribution, any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime; * * *
>
> * * * * * * *
>
> Is guilty of a misdemeanor * * *."

The action is a prosecution by the appellee of the appellant charging him with a violation of Section 1141, sub. 2 of the Penal Law in that he possessed with intent to sell copies of a magazine called "Headquarters Detective, True Cases from the Police Blotter." He was found guilty of that offense and fined the sum of One Hundred ($100) Dollars. At the trial the constitutional validity of the statute was challenged (fol. 95-102, p. 32-34) upon a motion to dismiss the information. The court overruled the challenge and found defendant-appellant guilty. The following appeared at the trial:

> "Mr. Rosenthal: Would your Honor hear me at greater length on the question of subdivision 2?
> "Justice Cooper: All right.
> "Mr. Rosenthal: I made a research into the cases decided under this section and could find no cases, or no cited cases under subdivision 2. In my humble opinion, that subdivision is clearly unconstitutional,

and I say it for this reason: that if you follow the letter of the law, a case-book used in law school in criminal law, which is a book composed primarily of crime or stories of crime or articles concerning crime, would be banned by this subdivision.

"Justice Doyle: You claim that our New York criminal law library then would——

"Mr. Rosenthal: If you follow the letter of the law, I say to you that every detective thriller, every detective story that has been written, these crime and mystery stories that are published and sold throughout the land, can be banned by this section, if you follow that section; and that the various Western stories, biff-bang boys, Dead-eye Dick shoots four Indians, all the Nick Carter stories which I read as a boy, and I imagine some of the members on this bench read; even Horatio Alger with some of his blood and thunder.

"Justice Cooper: As far as I am concerned, you are treading on safer ground when you speak of Horatio Alger. I'll tell you how much I think of Horatio Alger. I really feel that while it is not literature, it has done a great deal to inculcate in boys as they grow up some of the very fine copy-book maxims. But I certainly think that is a far cry from the lurid, crazy material that makes up People's Exhibits 4 and 5.

"Justice Doyle: We know so many Horatios on our bench, too, you know.

"Mr. Rosenthal: That I know.

"Might I say this with respect to People's Exhibits 4 and 5: I happen to know—not with respect to this particular magazine, but in general—how these magazines are created. They are written primarily and practically entirely by either newspaper men or retired newspaper men. The facts are obtained from files of the various police courts or the various newspaper clips, and it is a rehashing and a rewriting of things that have been in public print.

"Now, I can't see where a limitation of the sort that is attempted to be set forth in subdivision 2 is constitutional, because if you follow it to its logical

conclusion, every book, every magazine that deals with bloodshed or lust or things of that sort, and deals with nothing else—I mean, the average detective story, it deals with a crime, sometimes there is a killing in it, sometimes there are three or four or five killings in it; The Bat, the play The Bat——

"Justice Cooper: It is not the killings per se, Mr. Rosenthal; it is the manner in which it is treated and handled and set up in the magazine—the typography, and the language used to depict these crimes—that we feel brings it within the prohibition of subdivision 2 of the section involved; and that, of course, is our judgment; we may be in error.

"Mr. Rosenthal: I understand.

"Justice Cooper: But we know the arguments that are always advanced, and we have examined these exhibits particularly to decide whether from our point of view they do offend within the meaning of that subdivision, and we have decided that they do as a prima-facie case.

"Mr. Rosenthal: I understand.

"May I have an exception to your Honors' ruling on the motion.

"Justice Cooper: Certainly, certainly."

The Appellate Division thereafter, upon appeal to it, affirmed the judgment with an opinion hereto annexed upholding the constitutional validity of the law. An appeal was thereupon duly heard and decided by the Court of Appeals on the sole claim that the law was repugnant to the Constitution. That Court by a divided vote upheld its validity, and wrote an opinion, a copy of which is hereto annexed.

The question is a substantial one not only because the validity of this statute was never passed upon before in the Courts of the State of New York, or in the Supreme Court of the United States, but also the opinions rendered in the courts in which this case was heard indicate that a

review is necessary to set at rest serious questions concerning freedom of publication. The statute attacked purports on its face and by its application to suppress the freedom of publication, and that it is so indefinite that one publishes or distributes a book or magazine at his peril. Intensive research reveals that the Supreme Court of the United States has never passed upon a similar statute, and therefore its novelty and public importance renders the question a substantial one.

Respectfully submitted,

ARTHUR N. SEIFF,
Attorney for Defendant-Appellant.

APPENDIX "A"

Opinion of Appellate Division, First Department

SUPREME COURT, APPELLATE DIVISION—FIRST DEPARTMENT, MARCH, 1944

Francis Martin, P. J.; Alfred H. Townley, Edward J. Glennon, Edward S. Dore, Albert Cohen, J. J.

14150

PEOPLE OF THE STATE OF NEW YORK, *Respondent*,

vs.

MURRAY WINTERS, *Appellant*

Appeal from a judgment of the Court of Special Sessions of the City of New York, County of New York, convicting defendant of the crime of possessing with intent to sell magazines in violation of Subdivision 2 of Section 1141 of the Penal Law.

Arthur N. Seiff for appellant.

Alan J. Elliot of counsel (Stanley H. Fuld with him on the brief; Frank S. Hogan, District Attorney) for respondent.

Emanuel Redfield of counsel (Osmond K. Fraenkel, attorney) for New York City Committee, American Civil Liberties Union as *Amicus Curiae*.

Opinion of Appellate Division, First Department

COHEN, *J.*:

Defendant, a book dealer, found in possession of a large number of magazines which purported to contain true cases of crimes from police records and files, was convicted in the Court of Special Sessions of the City of New York of a violation of Subdivision 2 of Section 1141 of the Penal Law.

The statute reads as follows:

"A person * * * who * * *

2. Prints, utters, publishes, sells, lends, gives away, distributes or shows, or has in his possession with intent to sell, lend, give away, distribute or show, or otherwise offers for sale, loan, gift or distribution, any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime; * * *

* * * * * * *

Is guilty of a misdemeanor * * *."

Upon the evidence submitted at the trial, there was a sufficient showing that defendant had in his possession the magazines with intent to sell. As the information charges, the magazines are, without doubt, "devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime." They contain a collection of crime stories which portray in vivid fashion tales of vice, murder and intrigue. The stories are embellished with pictures of fiendish and gruesome crimes, and are besprinkled with lurid photographs of victims and perpetrators. Featured articles bear such titles as "Bargains in Bodies," "Girl Slave to a Love Cult," and "Girls' Reformatory"; these suggest the pattern of the literature.

That such publications tend to demoralize the minds of their more impressionable readers cannot be doubted. The statute which is aimed at restraining the publication and sale of such printed matter, we think, is a legitimate exercise of the police power of the state in that it is designed to promote the general welfare and to protect the morals of the community (*People* v. *Gitlow*, 234 N. Y. 132, 137, affirmed *Gitlow* v. *New York*, 268 U. S. 652). A similar statute was upheld by the Supreme Court of Errors of the State of Connecticut upon the ground that publications devoted wholly or mainly to lawless deeds of bloodshed,

lustful or lascivious conduct are "calculated to induce, especially among the young, the immoralities they are thus incited to dwell upon, and so to endanger the public morals" (*State* v. *McKee*, 73 Conn. 18, 26, 46 Atl. 409, 412).

Upon the same principle, it has been held in other jurisdictions, that a state may forbid the publication of details of an execution of death for crime (*State* v. *Pioneer Press Co.*, 100 Minn. 173, 110 N. W. 867) or the publication of scandal, and stories of immoral conduct (*Williams* v. *State*, 130 Miss. 827, 94 So. 882; *In re Banks*, 56 Kan. 242, 42 Pac. 693, 694; *State* v. *Van Wye*, 136 Mo. 227, 37 S. W. 938; *Commonwealth* v. *Herald Pub. Co.*, 128 Ky. 424, 108 S. W. 892).

The statute here involved condemns the sale and printing of books, pamphlets, magazines and newspapers, which are "devoted to the publication and principally made up of" pictures and stories of deeds of bloodshed, lust or crime. Publications dealing with crime news as an incident to the legitimate purposes of science or literature are not prohibited. Moreover, as the prosecution readily concedes, the statute does not seek to suppress "a large class of recognized literature including practically all detectives and western stories and books. It is aimed exclusively at printed matter which presents tales of bloodshed, crime or lust in a manner that would have a tendency to demoralize its readers and would be likely to corrupt the morals of the young and lead them to immoral acts.

Defendant urges that the law under which he was convicted is unconstitutional in that it violates the State Bill of Rights (Art. 1, Section 8) and the Fourteenth Amendment of the Federal Constitution.

The State Constitution (Art. 1, Section 8) provides in part:

> "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."

The freedom of speech and of the press, which is secured by such a constitutional guaranty, does not imply complete

exemption from responsibility for everything a citizen may say or publish. Indeed, the state Bill of Rights expressly provides that a person exercising the freedom is responsible for the abuse of that right.

Pursuant to the police power and without abridging freedom of the press, the state may enact reasonable regulations in order to protect the general welfare, public safety and order and public morals. In *People* v. *Gitlow, supra,* the Court of Appeals (at p. 137) said:

> "While the right to publish is thus sanctioned and secured, the abuse of that right is excepted from the protection of the Constitution, and authority to provide for and punish such abuse is left to the Legislature. The punishment of those who publish articles which tend to corrupt morals, induce crime or destroy organized society, is essential to the security of freedom and stability of the state. While all the agencies of government, executive, legislative and judicial, cannot abridge the freedom of the press, the Legislature may control and the courts may punish the licentiousness of the press."

In *People* v. *Most,* 171 N. Y. 423, the court said (p. 431):

> "The Constitution does not protect a publisher from the consequences of a crime committed by the act of publication. It does not shield a printed attack on private character, for the same section from which the above quotation is taken expressly sanctions criminal prosecution for libel. It does not permit the advertisement of lotteries, for the next section prohibits lotteries and the sale of lottery tickets. It does not permit the publication of blasphemous or obscene articles, as the authorities uniformly hold. (People v. Ruggles, 8 Johns. 290, 297; People v. Muller, 96 N. Y. 408; In Re Rapier, 143 U. S. 110). It places no restraint upon the power of the legislature to punish the publication of matter which is injurious to society according to the standard of the common law. It does not deprive the state of the primary right of self-preservation. * * *"

By the due process clause of the Fourteenth Amendment of the Federal Constitution, it is provided:

> "nor shall any State deprive any person of life, liberty, or property, without due process of law."

It is now well settled that freedom of the press, like freedom of speech, is a fundamental public right and that the due process clause of the Fourteenth Amendment may make it unlawful for a State to abridge by its statutes freedom of the press which the First Amendment safeguards against encroachment by Congress. (*Thornhill* v. *Alabama*, 310 U. S. 88, 95; *Lovell* v. *Griffin*, 303 U. S. 444, 450; *Grosjean* v. *American Press Co.*, 297 U. S. 233, 244; *Palko* v. *Connecticut*, 302 U. S. 319, 324.) However, it is equally well settled that this constitutional guaranty of freedom of speech and of the press does not deprive the State of its police power to enact laws in the legitimate exercise of the police power. (*Gitlow* v. *New York*, 268 U. S. 652, 666, 667; *Stromberg* v. *California*, 283 U. S. 357, 359, 368, 369.) In *Near* v. *Minnesota*, 283 U. S. 697, the Supreme Court reiterated the principle in the following language by Chief Justice Hughes (p. 707):

> "It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action. It was found impossible to conclude that this essential personal liberty of the citizen was left unprotected by the general guaranty of fundamental rights of person and property. * * * In maintaining this guaranty, the authority of the state to enact laws to promote the health, safety, morals and general welfare of its people is necessarily admitted. The limits of this sovereign power must always be determined with appropriate regard to the particular subject of its exercise. * * * Liberty of speech, and of the press, is also not an absolute right, and the state may punish its abuse."

Accordingly, we conclude that the statute challenged is valid, that its enactment is a legitimate exercise of the

police power of the State, and that it is not violative of the State or the Federal Constitution.

The judgment of conviction should be affirmed.

All concur.

APPENDIX "B"

THE PEOPLE OF THE STATE OF NEW YORK, *Respondent, et al.*,

v.

MURRAY WINTERS, *Appellant*

(Decided July 19, 1945)

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the first judicial department, from a judgment of said court, entered May 19, 1944, which unanimously affirmed a judgment of the Court of Special Sessions of the City of New York, New York County (Cooper, P. J.; Flood and Doyle, JJ.), convicting defendant of the crime of unlawfully possessing, with intent to sell, printed paper devoted to accounts of deeds of bloodshed, lust or crime, in violation of subdivision 2 of section 1141 of the Penal Law.

Arthur N. Seiff for appellant.

Emanuel Redfield and Osmond K. Fraenkel for New York City Committee of American Civil Liberties Union, *amicus curiae*, in support of appellant's position.

Sidney R. Fleisher for Authors' League of America, Inc., *amicus curiae*, in support of appellant's position.

Frank S. Hogan, District Attorney (Alan J. Elliot and Whitman Knapp of counsel), for respondent.

LOUGHRAN, *J.*:

After trial in the Court of Special Sessions of the City of New York, the defendant was convicted upon charges that he had possessed certain printed materials with intent to sell them, contrary to Penal Law, article 106, section 1141, subdivision 2. The Appellate Division affirmed

and the justice who wrote its opinion gave the defendant leave to present the case to us.

The relevant words of section 1141 are these: "A person * * * who * * * 2. Prints, utters, publishes, sells, lends, gives away, distributes or shows or has in his possession with intent to sell, lend, give away, distribute or show, or otherwise offers for sale, loan, gift or distribution, any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures or stories of deeds of bloodshed, lust or crime * * * is guilty of a misdemeanor * * *." Numerous copies of magazines composed entirely of such pictures and stories were found on the occasion in question in the bookshop of the defendant.

Defense counsel takes the above text at its full literal meaning. "The statute (he says) makes no distinction between truth, fiction and statistics. All come within its condemnation equally, provided they consist of 'criminal news' or 'police reports' or 'accounts of criminal deeds.'" From his viewpoint the statute "condemns any publication devoted to and principally made up of criminal news or police reports or accounts of criminal deeds regardless of the manner of treatment." This conception—which would outlaw all commentaries on crime from detective tales to scientific treatises—may, we think, be dismissed at once on the short ground that its manifest injustice and absurdity were never intended by the Legislature. (See *Crooks* v. *Harrelson*, 282 U. S. 55.) On the other hand, we are to heed the rule which tells us to read a statutory text in accordance with the general subject matter of which it is a part. (See *Matter of Rouss*, 221 N. Y. 81, 91; *Matter of Kaplan* v. *Peyser*, 273 N. Y. 147.)

In this instance, the general subject matter constitutes Penal Law, article 106, the caption of which is "Indecency." The above text forms subdivision 2 of section 1141 of article 106. The caption of section 1141 is "Obscene prints and articles." Indecency and obscenity are not and never have been technical terms of the law and hence we are without any full or rigorous definition of the uses made thereof in the administration of justice. To be sure, our

statutes dealing with indecent or obscene publications have generally been held to speak of that form of immorality which has relation to sexual impurity. (*People* v. *Muller*, 96 N. Y. 408; *Swearington* v. *United States*, 161 U. S. 446.) Such indeed is the way this court has read subdivision 1 of section 1141 of the Penal Law. (*People* v. *Eastman*, 188 N. Y. 478.) But to limit the above words of subdivision 2 of section 1141 to that restricted meaning would be to reduce that subdivision to an unnecessary partial reduplication of subdivision 1. Since our respect for the Legislature is enough to keep us away from that interpretation, we move along to the question of the validity of the broader scope of subdivision 2. From this point on, that subdivision will be called the statute.

Indecency or obscenity is an offense against the public order. (9 Halsbury's Laws of England (1st ed.), 530, 538; Harris & Wilshire's Criminal Law (17th ed.) 216; 1 Bishop's Criminal Law (9th ed.) 500, 504.) Collections of pictures or stories of criminal deeds of bloodshed or lust unquestionably can be so massed as to become vehicles for inciting violent and depraved crimes against the person and in that case such publications are indecent or obscene in an admissible sense, though not necessarily in the sense of being calculated or intended to excite sexual passion. This idea, as it seems to us, was the principal reason for the enactment of the statute. (Cf. *Magon* v. *United States*, 248 F. 201, certiorari denied, 249 U. S. 618; *Foy Productions, Ltd.* v. *Graves*, 278 N. Y. 498.)

There is, as we are also persuaded, ample warrant in the evidence for the finding that the magazines which were taken from the defendant's premises were obnoxious to the statute. The 2,000 copies he kept there were tied up in small bundles that were suitable for delivery to distributors. There is proof of an admission by the defendant of his readiness to sell single copies indiscriminately. The contents are nothing but stories and pictures of criminal deeds of bloodshed and lust. The Appellate Division said: "The stories are embellished with pictures of fiendish and gruesome crimes, and besprinkled with lurid photographs of victims and perpetrators. Featured articles bear such titles as 'Bargains in Bodies,' 'Girl Slave to a Love Cult'

and 'Girls Reformatory.'" It is not suggested that any of the contributors was distinguished by his place in the literary world or by the quality of his style. (Cf. *Halsey* v. *New York Society*, 234, N. Y. 1.) In short, we have here before us accumulations of details of heinous wrongdoing which plainly carried an appeal to that portion of the public who (as many recent records remind us) are disposed to take to vice for its own sake. Whether the statute extends to accounts of criminal deeds not characterized by bloodshed or lust is a question that does not here arise. (See *United States* v. *Limehouse*, 285 U. S. 424; *Jeffrey Mfg. Co.* v. *Blagg*, 235 U. S. 571, 576; *People* v. *Sanger*, 222 N. Y. 192.)

We pass now to the defendant's contention that the statute is unconstitutional because the criterion of criminal liability thereunder is "a personal taste standard, uncertain, indefinite and *ex post facto* in its practical operation." In the nature of things there can be no more precise test of written indecency or obscenity than the continuing and changeable experience of the community as to what types of books are likely to bring about the corruption of public morals or other analogous injury to the public order. Consequently, a question as to whether a particular publication is indecent or obscene in that sense is a question of the times which must be determined as matter of fact, unless the appearances are thought to be necessarily harmless from the standpoint of public order or morality. (See *People* v. *Pesky*, 254 N. Y. 373; *People* v. *Wendling*, 258 N. Y. 451; *People* v. *Streep*, 264 N. Y. 666; *People* v. *Berg*, 269 N. Y. 514; *People* v. *Fellerman*, 269 N. Y. 629; *People* v. *Brewer*, 272 N. Y. 442; *Foy Productions Ltd.* v. *Graves*, 278 N. Y. 498; *People* v. *Osher*, 285 N. Y. 793.) Never has this perception been more forcefully expressed than in this sentence by Cardozo, J.: "Law accepts as the pattern of its justice the morality of the community whose conduct it assumes to regulate." (Paradoxes of Legal Science, 37.) The constitutional validity of that standard has long been established. (*United States* v. *Rosen*, 161 U. S. 29.) (See *United States* v. *Rebhuhn*, 109 F. 2d 512, 514; *Magon* v. *United States*, 248 F. 201, certiorari denied 249 U. S. 618.)

Under the statute, as the defendant sees it, "publication of any crime book or magazine would be hazardous." For reasons that have already been stated, we believe this assertion to be an exaggeration; but the point is of little account in any event, since "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree." (*Nash* v. *United States*, 229 U. S. 373, 377.) A recent illustration comes readily to hand: An occupier of land who by his use of it does an unreasonable injury to his neighbor's property can be held to answer therefor, though he may have been guilty of no more than an error of judgment. (*Dixon* v. *New York Trap Rock Corp.*, 293 N. Y. 509.) So when reasonable men may fairly classify a publication as necessarily or naturally indecent or obscene, a mistaken view by the publisher as to its character or tendency is immaterial.

In anticipation perhaps of what we have already said, the defendant lastly argues for a fresh conception of freedom of the press under which the heretofore accepted requirements of decency would no longer be operative against obscene publications. We see no immediate necessity for announcing so radical a departure from the collective reasoning of our ancestors, a position whereof we think ourselves to be assured by the following words of the highest court in the land: "Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise a constitutional problem. These include the lewd and obscene, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." (*Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571-572. See the

cases there cited and 2 Cooley on Constitutional Limitations (8th ed.), 886, 1328.)

The judgment should be affirmed.

LEHMAN, *Ch. J.*, (dissenting):

I dissent on the ground that the statute, as construed by the court, is so vague and indefinite as to permit punishment of the fair use of freedom of speech. (*Stromberg* v. *California*, 283 U. S. 359.) Though statutes directed against "obscenity" and "indecency" are not too vague when limited by judicial definition, they may be too vague when not so limited. (See *McJunkins* v. *State*, 10 Ind. 140; *Jennings* v. *State*, 16 Ind. 335.) It is the function of the Legislature to define the kind of conduct which is harmful from the standpoint of public order or morality and should be prohibited. Then the question whether the conduct of a defendant falls within that definition may be one of fact. The morality of the community does not, however, become the standard of permissible conduct until the Legislature has embodied its conception of that morality in a regulatory statute.

Judgment should be reversed.

Lewis, Conway, Desmond, Thacher and Dye, JJ., concur with Loughran, J.; Lehman, Ch. J., dissents in opinion.

Judgment affirmed.

Supreme Court of the United States

OCTOBER TERM, 1945

MURRAY WINTERS,

Defendant-Appellant,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

APPELLANT'S MEMORANDUM IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

ARTHUR N. SEIFF,
Attorney for Defendant-Appellant.

RECORD PRESS—NYC—REctor 2-2638

INDEX

TABLE OF CASES CITED:

OTHER AUTHORITIES CITED:

Supreme Court of the United States

OCTOBER TERM, 1945

MURRAY WINTERS,

Defendant-Appellant,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

APPELLANT'S MEMORANDUM IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

Question Involved on This Motion

This memorandum is submitted in opposition to appellee's motion to dismiss this appeal, or in the alternative, to affirm the judgment appealed from. Appellee argues that no substantial constitutional question is involved. It is appellant's contention that a substantial, important, and novel constitutional question is involved that should be passed upon by this Court.

The statute (Penal Law, State of New York, Section 1141, subdivision 2) under which appellant was convicted provides:

"A person • • • who • • •

2. Prints, utters, publishes, sells, lends, gives away, distributes or shows, or has in his possession with intent to sell, lend, give away, distribute or show, or otherwise offers for sale, loan, gift or distribution, any book, pamphlet, magazine, newspaper or other printed

paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime; * * *

* * * * *

Is guilty of a misdemeanor * * *."

Appellant contends that this statute, and his conviction thereunder, are in violation of the Fourteenth Amendment of the Constitution of the United States. That this contention was urged in all the courts below, and that those courts necessarily passed thereon, is shown in the record of this case on file in the office of the Clerk of this Court. To avoid repetition, and to avoid unnecessarily extending this memorandum, appellant respectfully refers this Court to the jurisdictional statement on file. It will also be noted therefrom that the appellate courts of the state of New York thought this question sufficiently important to write lengthy opinions, and that the Chief Judge of the Court of Appeals of the State of New York dissented from the affirmance on the ground that "the statute, as construed by the court, is so vague and indefinite as to permit punishment of the fair use of freedom of speech." In addition, it took the Court of Appeals more than six months to decide the case after the argument thereof.

A question of freedom of the press is involved. The statute in question has never been passed upon in this Court, or in any court of any state of the United States other than in this case and in the case of *State* v. *McKee* (73 Conn. 18) decided in Connecticut in 1900.

Analysis of the Statute Involved

There are certain salient features regarding the statute that should be noted:

(a)

It has been conceded by the appellee in all the courts of the state of New York that there is no issue of obscenity in this case.

The charge and conviction against appellant are not under subdivision 1 of section 1141 which bans obscene literature, but under subdivision 2 of that section which is directed against publications devoted to criminal news, police records, or accounts of criminal deeds, etc.

An examination of subdivision 2 shows that it is not complementary to subdivision 1; that it applies to an entirely different and distinct type of writings, namely, those dealing with crime.

The parties to this appeal have always agreed on this point, and that the application of the rule of *ejusdem generis* to subdivision 2 shows this clearly.

(b)

The classifications prohibited by subdivision 2 are in the disjunctive—"criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime"—so that a publication devoted to any one of these classes comes within the condemnation of the statute.

(c)

The statute makes no distinction between truth, fiction, or statistics. All come within its condemnation equally, provided they consist of "criminal news" or "police reports" or "accounts of criminal deeds". Parenthetically, it has never been denied that the magazines involved in this case contain "true cases of crimes from police records and files".

(d)

Although the statute in question was enacted in 1884, this appears to be the first prosecution thereunder. That statute appears never to have been applied or tested heretofore. There appears to be no "clear and present danger" to which the statute was addressed.

ARGUMENT

It is freedom of the press, which is "in a preferred position" (*Murdock* v. *Pennsylvania*, 319 U. S. 105, 115; *Follette* v. *Town of McCormick*, 64 Sup. Ct. 717, 718), and which is "to be guarded with a jealous eye" (*American Federation of Labor* v. *Swing*, 312 U. S. 321, 325), that is involved.

Appellant contends that the statute constitutes repression rather than regulation; that even in regulation the power to restrict is the exception rather than the rule; and that the statute constitutes a type and degree of repression beyond the power of the legislature. (*Martin* v. *Struthers*, 319 U. S. 141, 151; *Schneider* v. *State*, 308 U. S. 147, 161; *Herndon* v. *Lowry*, 301 U. S. 242, 258; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568; 571-572; *Ex parte Harrison*, 212 Mo. 88, 92-93; *Colon* v. *Lisk*, 153 N. Y. 188, 196-197.

Since the statute is in the disjunctive, this raises the question of the validity not merely of the statute taken as a whole, but of each one of the various classes of publications made a crime.

Stromberg v. *California*, 283 U. S. 359, 364-365.

The judgment of conviction against appellant was a general one. It did not specify the classification within the

statute upon which it rested. As there are several distinct classifications set forth in the statute, and the trial court might have convicted with respect to any one of them, independently considered, it is impossible to say under which one the conviction was obtained. If any one of the classifications of the statute is invalid under the constitution, the conviction cannot be upheld.

> *Stromberg* v. *California*, 283 U. S. 359, 367-368; *Williams* v. *North Carolina*, 317 U. S. 287.

The statute is comprehensive with respect to the classifications of publications it proscribes. Those classifications are general and all-inclusive. The statute contains no exceptions or limitations in its application to writings falling within any of the classifications therein specified. It makes no attempt at regulation or discrimination. It is not regulation—it is repression. Its character is such that it strikes at the very foundation of freedom of the press by arbitrarily outlawing an entire class of long-recognized literature.

Assuming *arguendo* that it might have been competent for the legislature to have passed an act to operate upon certain types or degrees of crime literature as such (this we dispute because of the holdings in *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571-572 and *Ex parte Harrison*, 212 Mo. 88, 92-93), the act before this Court makes no distinction whatever. It operates equally upon all literature falling within any one of the classifications therein enumerated. Its provisions are arbitrary. It is a dragnet which may enmesh anyone who publishes or sells crime literature. Its language is unambiguous and furnishes a readily ascertainable standard of guilt—it condemns any publication devoted to and principally made up of criminal news or police reports or accounts of criminal deeds, re-

gardless of the manner of treatment. Even the right to publish the truth is not respected. The statute does not recognize any defense based upon any distinction, but condemns all.

No conviction under the statute can stand.

> *Thornhill* v. *Alabama*, 310 U. S. 88, 97;
> *People ex rel. Alpha P. C. Co.* v. *Knapp*, 230 N. Y. 48, 54;
> *Murphy* v. *Commonwealth*, 172 Mass. 264, 273;
> *Wynehamer* v. *People*, 13 N. Y. 378, 424-425, 440-442.

The language of subdivision 2 being plain, unambiguous, and imperative, there is nothing for the courts to do but obey it to its full extent, if constitutional, or strike it down, if unconstitutional. What would happen if it were to be enforced to its full extent demonstrates its unreasonable repressiveness.

A statute which on its face is so broad as to permit the punishment for fair use of freedom of the press is repugnant to the constitutional guaranties. This statute would permit punishment for the publication of police reports alone, or criminal news alone, as well as accounts of criminal deeds, or any of the other prohibited matters. It does not make provision for the publication of truth or statistics, or concern itself with the manner of treatment of the writing. It therefore is invalid, and the conviction thereunder must be reversed.

> *Stromberg* v. *California*, 283 U. S. 359, 369;
> *Williams* v. *North Carolina*, 317 U. S. 287, 292.

We are not dealing with a statute properly limited in its scope, but with a statute so broad and all-inclusive as

to constitute so stringent a prohibition that it comes within the condemnation of the Constitution. The outright prohibition by subdivision 2 of any publication falling within any of the specified classes of publications renders the statute invalid.

In *Martin* v. *Struthers*, 319 U. S. 141, it was held, at page 151:

> "The fact that some regulation may be permissible, however, does not mean that the First Amendment may be abrogated. We are not dealing here with a statute, 'narrowly drawn to cover the precise situation' that calls for remedial action (cts.). * * * Prohibition may be more convenient to the law maker, and easier to fashion than a regulatory measure * * *. But that does not justify a repressive enactment like the one now before us."

This is particularly so because freedom of the press is a right not lightly to be taken away.

It should be noted that there is no need for such a statute. The provisions of subdivision 1 of section 1141 are broad enough to encompass any and all writings and pictures of an indecent nature.

The very provisions of the New York Penal Law referred to by appellee (sections 1140, 1140-a, 1140-b, subdivision 1 of 1141, 1141-a, 1142, 1142-a, 1143, 1145, 1146, 1148), when contrasted with the statute involved in this case (subdivision 2 of section 1141), bring out all the more forcibly the vagueness and all-inclusiveness of the latter statute. All the other statutes describe specific acts and particularize with descriptive adjectives those acts, whereas subdivision 2 of section 1141 does not do so. On the contrary, it embraces all publications devoted either to crim-

inal news, or police reports, or accounts of criminal deeds, etc., regardless of whether the same are factual, fictional, or statistical.

The construction placed on subdivision 1 of section 1141, as set forth in appellee's memorandum stems from the many adjectives used in that subdivision, namely, "obscene, lewd, lascivious, filthy, indecent or disgusting", whereas subdivision 2 refers generically to "criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime", which, considering the rule of *ejusdem generis*, and the fact that the statute is in the disjunctive, completely differentiates it from subdivision 1.

The statute on its face is unconstitutional, and a reading thereof shows that its aim is all-inclusive rather than limited, as argued by appellee.

Finally, the rule as contended for by appellee, regarding the power of the states to limit freedom of the press is not as broad as appellee contends. In any event, that right is one of regulation, proper regulation, not repression.

IN CONCLUSION,

it is respectfully submitted that appellee's motion be denied, and that this Court take jurisdiction of this case.

ARTHUR N. SEIFF,
Attorney for Defendant-Appellant.

IN THE

Supreme Court of the United States

OCTOBER TERM 1945

No. 33

MURRAY WINTERS,

Appellant,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

APPELLANT'S BRIEF

ARTHUR N. SEIFF,
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INDEX

Table of Cases:

Other Authorities Cited:

IN THE

Supreme Court of the United States

OCTOBER TERM 1945

No. 636

MURRAY WINTERS,

Appellant,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

APPELLANT'S BRIEF

Opinions Below

The opinion of the Appellate Division of the Supreme Court of the State of New York is reported at 268 App. Div. 30. The opinion of the Court of Appeals of the State of New York is reported at 294 N. Y. 545.

Jurisdictional Statement

The jurisdiction of this Court is invoked under Section 237 (a) of the Judicial Code (28 U. S. C. A. 861 (a) and 861 (b)).

Statute Involved

Appellant was convicted of violating subdivision 2 of Section 1141 of the Penal Law of the State of New York (R. 1, 23).[1] That statute reads:

"A person * * * who * * *

2. Prints, utters, publishes, sells, lends, gives away, distributes or shows, or has in his possession with intent to sell, lend, give away, distribute or show, or otherwise offers for sale, loan, gift or distribution, any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime; * * *

Is guilty of a misdemeanor * * *."

Features of the Statute

(a)

There is no issue of obscenity in this case. Appellee has conceded this in all the State Courts.

The charge and conviction against appellant are not under subdivision 1 of Section 1141 which bars "obscene, lewd, lascivious, filthy, indecent or disgusting" publications; but under subdivision 2 which is directed against publications devoted to "criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of bloodshed, lust or crime."

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1 Appellant contested the constitutionality of the statute in all the State Courts, and those Courts necessarily passed on that question (R. 23, 31, 39, 40-41, 43).

(b)

The classifications proscribed by subdivision 2 are in the disjunctive, so that a publication devoted to any one of the subjects named comes within the statute.

(c)

The statute makes no distinction between truth, fiction, and statistics. All come within its condemnation equally, provided they consist of "criminal news" or "police reports" or "accounts of criminal deeds" etc.

(d)

The statute itself is general and all-inclusive with respect to the classifications of writings it bans, and with respect to its application. No limitations are stated therein; no standard or definition given; no attempt made at discrimination or regulation.

History of the Statute

(a)

Prior to 1884 there was no law in New York State barring publications like those here involved. There was a statute barring "obscene or indecent" writings—Section 317 of the Penal Code of the State of New York.[2]

In 1884, the Legislature of the State of New York amended Section 317[3] by adding thereto three paragraphs, of which the last two have no bearing herein. The entire

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2 The predecessor of subdivision 1 of Section 1141 of the Penal Law.

3 By Chapter 380 of the Laws of 1884.

previous section became Subdivision 1 of the amended section—the Legislature's marginal note describing the purpose thereof read, "Selling, giving away, etc., obscene books, etc., a misdemeanor."

Subdivision 2, newly added, read:

> "2. Sells, lends, gives away, or shows, or has in his possession with intent to sell or give away, or to show, or advertises or otherwise offers for loan, gift, sale or distribution, *to any minor child*, any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, or principally made up of criminal news, police reports or accounts of criminal deeds or pictures and stories of deeds of bloodshed, lust or crime; * * *" (Emphasis mine.)

The Legislature's marginal note describing the purpose of this new law read, "Ibid. to minor child, of papers, etc., devoted to police reports, etc."

In 1887 the Legislature amended Section 317 again.[4] Subdivision 1 was amplified so that the reference to "obscene or indecent" writings became one to "obscene, lewd, lascivious, filthy, indecent or disgusting" writings.[5] Subdivision 2 was amended to read substantially as subdivision 2 of Section 1141 reads.[6] The words "to any minor child" were eliminated, and a few additional acts, such as, "Prints, utters, publishes," were added. In fact, with the exception of the word, "distributes," which was added in

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4 By Chapter 692 of the Laws of 1887.

5 Subdivision 1 of Section 317 of the Penal Code subsequently became subdivision 1 of Section 1141 of the Penal Law.

6 Subdivision 2 of Section 317 of the Penal Code subsequently became subdivision 2 of Section 1141 of the Penal Law, the statute involved in this case.

a later year, subdivision 2 of Section 317 of the Penal Code as amended by the Laws of 1887 was identical with subdivision 2 of Section 1141 of the Penal Law,* the statute involved herein.

In Chapter 692 of the Laws of 1887, the Legislature's marginal note to subdivision 1 referred to "obscene publications," and the marginal note to subdivision 2 referred to "police and immoral publications."

The foregoing shows that the statute in its present form was not intended to be restricted in its application to any particular class or type of persons.

(b)

Although subdivision 2 was enacted over sixty years ago, the instant case is the only reported time it was ever applied. It seems that except for the case at bar, it has been a "dead letter law" from the day of its adoption, and that there has been no reported prosecution under, or application of it. In connection with this should be borne in mind the fact that magazines and books of this kind have been published and sold freely and openly during that period, and still are.

Statement of the Case

(a) Proceedings in the Court of Special Sessions of the City of New York.

On December 2, 1942, the District Attorney of New York County, on the complaint of an agent of the New York Society for the Suppression of Vice, filed an information against appellant in the Court of Special Sessions of the

* The Penal Law is the successor to the Penal Code.

City of New York. The information contained five counts, of which the first three charged appellant with violating subdivision 1 of Section 1141 of the New York Penal Law, and the last two charged appellant with violating subdivision 2 of Section 1141 (R. 2-5, 23).

The charges were that appellant, the owner of a retail book store, in August, 1942 possessed with intent to sell, and offered for sale certain magazines, which the information alleged violated the above laws.

After a trial in the Court of Special Sessions, appellant was acquitted on the first three counts, those charging a violation of subdivision 1 (the "obscenity" statute); and was convicted on the last two counts, those charging a violation of subdivision 2 (R. 5, 23).

(b) Appeal to, and decision of the Appellate Division.

Appellant appealed to the Appellate Division of the Supreme Court of the State of New York from the judgment of conviction (R. 1-2). That court affirmed the conviction, holding the statute within the police power of the state on the ground that it was aimed at restraining publications which "tend to demoralize the minds of their more impressionable readers,"[8] and so was "designed to promote the

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8 This test adopted by the Appellate Division came from the long abandoned doctrine of *Regina* v. *Hicklin*, L. R. 3 Q. B. 360, viz., "the tendency to deprave and corrupt those whose minds were open to immoral influence."

In rejecting this doctrine, Judge Learned Hand, in *United States* v. *Levine*, 83 Fed. 2d, 156, 157, held:

> "No civilized community not fanatically puritanical would tolerate such an imposition, and we do not believe that the courts that have declared it, would ever have applied it consistently."

general welfare and to protect the morals of the community". (R. 38).

(c) Appeal to, and decision of the Court of Appeals.

Appellant, by leave of the justice of the Appellate Division who wrote the opinion for that court, appealed to the Court of Appeals of the State of New York (R. 35, 36). That Court affirmed the conviction (Chief Judge Lehman dissenting) on the ground that "Indecency or obscenity is an offense against the public order" and that subdivision 2 is directed against a form of indecency different from that referred to in subdivision 1 (R. 46).

Such a test would bar all books on the subject, however treated. The Court of Appeals of the State of New York, in *People* v. *Muller*, 96 N. Y. 408, 411, overruled a like test suggested for subdivision 1 of Section 1141:

> "If the test of obscenity or indecency in a picture or statue is its capability of suggesting impure thoughts, then indeed all such representations might be considered as indecent or obscene. The presence of a woman of the purest character and of the most modest behavior and bearing may suggest to a prurient imagination images of lust, and excite impure desires, and so may a picture or statue not in fact indecent or obscene."

In *People* v. *Pesky*, 230 App. Div. 200, 204, aff'd. 254 N. Y. 373, it was held that the standard of judgment is the normal person, not the abnormal:

> "Conditions would be deplorable if abnormal people were permitted to regulate those matters."

Furthermore, the Appellate Division's holding that the statute is constitutional because it is aimed at publications that "*tend*" to effect a certain result is in direct conflict with the ruling of this court in *Bridges* v. *California*, 314 U. S. 252, 263, 273, which held that "neither 'inherent tendency' nor 'reasonable tendency' is enough to justify a restriction of free expression."

See also: *Whitney* v. *California*, 274 U. S. 357, 376-377.

After stating:

> "Collections of pictures or stories of criminal deeds of bloodshed or lust unquestionably can be so massed as to become vehicles for inciting violent and depraved crimes against the person and in that case such publications are indecent or obscene in an admissible sense, though not necessarily in the sense of being calculated or intended to excite sexual passion. This idea, as it seems to us, was the principal reason for the enactment of the statute."

the furthest the Court went with respect to the magazines involved in this case, was:

> "The contents are nothing but stories and pictures of criminal deeds of bloodshed and lust. The Appellate Division said: 'The stories are embellished with pictures of fiendish and gruesome crimes, and besprinkled with lurid photographs of victims and perpetrators. Featured articles bear such titles as "Bargains in Bodies," "Girl Slaves to a Love Cult" and "Girls Reformatory."' It is not suggested that any of the contributors was distinguished by his place in the literary world or by the quality of his style. (Cf. *Halsey* v. *New York Society*, 234 N. Y. 1.) In short, we have here before us accumulations of details of heinous wrongdoing which plainly carried an appeal to that portion of the public who (as many recent records remind us) are disposed to take to vice for its own sake" (R. 46).

The Court of Appeals tacitly admitted appellant's contention that "the criterion of criminal liability thereunder [under the statute] is 'a personal taste standard, uncertain, indefinite and *ex post facto* in its practical operation'"; answered it by stating:

> "In the nature of things there can be no more precise test of written indecency or obscenity than the continuing and changeable experience of the community as to what types of books are likely to bring about the corruption of public morals or other analogous injury to the public order."[9]

and brushed aside as of no importance the fact that under such a rule the "publication of any crime book or magazine would be hazardous" (R. 47).

And this, with reference to a penal statute suppressing the freedom of the press!

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9 The assumption by the Court that certain "types of books are likely to bring about the corruption of public morals or other analogous injury to the public order" is an over-simplification of a very complex subject, and runs counter to the findings of eminent authorities on criminology and crime prevention. Prof. Sheldon Glueck in *Preventing Crime* (McGraw-Hill, 1936) and Prof. Donald R. Taft in *Criminology* (Macmillan Co., 1942) show that no one factor can be said to cause crime, since the causes of crime are multiple. In no part of Prof. Glueck's book *Preventing Crime*, the most comprehensive book of its kind in recent years, has the kind of literature here in issue been designated as a cause of crime.

There is no way of anticipating the effect of any book on crimes, no matter how the subject may be treated, upon a "more impressionable" reader. A person who is predisposed to anti-social behavior because of the existence of other conditions which are pre-disposing factors might be motivated to imitate a crime described in *any* literature (even in Dickens or Shakespeare); but, any experience might be a precipitating factor for such a person. A person not so pre-disposed (and the criterion in applying the statute is such a person—*People* v. *Muller*, 96 N. Y. 408; *People* v. *Pesky*, 230 App. Div. 200, 204, aff'd. 254 N. Y. 373; *United States* v. *Levine*, 83 Fed. 2d, 156, 157) would not be led to imitate (*Criminology* by Prof. Donald R. Taft; *Art & Prudence* by Prof. Mortimer Adler).

In the field of morality there is the maxim: "According as a man is, so does the end seem to him." (Nichomachean, *Ethics*, Bk. III, 7, 1114-a, 32), and the metaphysical maxim: "That which is received is in the recipient according to the mode of the recipient."

It should be remembered that the original limitation in subdivision 2, "to any minor child," was removed in 1887, so that the present statute is unlimited in its application.

Lehman, *Ch. J.*, dissented as follows:

"I dissent on the ground that the statute, as construed by the court, is so vague and indefinite as to permit punishment of the fair use of freedom of speech. (Stromberg v. California, 283 U. S. 359.) Though statutes directed against 'obscenity' and 'indecency' are not too vague when limited by judicial definition, they may be too vague when not so limited. (See McJunkins v. State, 10 Ind. 140; Jennings v. State, 16 Ind. 335.). It is the function of the Legislature to define the kind of conduct which is harmful from the standpoint of public order or morality and should be prohibited. Then the question whether the conduct of a defendant falls within that definition may be one of fact. The morality of the community does not, however, become the standard of permissible conduct until the Legislature has embodied its conception of that morality in a regulatory statute" (R. 48-49).

The Magazines

The magazines, for whose possession and offer to sell appellant was convicted, are entitled, "Headquarters Detective, True Cases from the Police Blotter, June 1940," and "Headquarters Detective, True Cases from the Police Blotter, August 1940." As the Appellate Division stated, they "purported to contain true cases of crimes from police records and files" (R. 37), and in all the State courts they were so considered.

To describe even briefly the stories and pictures in the magazines would take too much and unnecessary time and space, unnecessary because the stories must be read in their entirety, and the pictures viewed in connection with such a reading, in order to assay them properly. It suffices to say that, except for a couple of stories in the nature of

"true confessions," they are the stories of actual crimes and prosecutions, written in large part in a reportorial fashion, giving dates, places, and names of persons involved; that many of them are told by County and State officials; that with a few exceptions (which are themselves innocuous) the pictures on their face show that they are actual photographs of the events; and that the recurrent theme of the stories is that *"Crime Does Not Pay."* Far from inciting to crime, they show that *"The Wages of Sin Is Death."*

The magazines themselves are of no great importance. The importance of this case stems, not from the merits or lack of merits of the magazines, but from the right infringed, and from what the effect of the statute could be, and what it could lead to. It is a wedge that should be destroyed, lest other restrictions be imposed in the name of the same alleged interest "to protect the morals of the community" (R. 38). "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion" (*Thomas* v. *Collins*, 323 U. S. 516, 545).

Specifications of Assigned Errors

The Court of Appeals of the State of New York erred:

1. In holding that Section 1141 sub. 2 Penal Law of the State of New York does not deprive appellant of his liberty without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

2. In refusing to hold that the said statute violates appellant's rights of freedom of speech and press un-

der the Fourteenth Amendment of the Constitution of the United States.

3. In refusing to hold that the said statute as applied to appellant denies him his rights of freedom of speech and press under the Fourteenth Amendment of the Constitution of the United States.

4. In refusing to hold that the said statute is so indefinite and uncertain as to deny appellant his liberty without due process of law under the Fourteenth Amendment of the Constitution of the United States.

5. In refusing to hold that the magazines possessed by the appellant were not a clear and imminent danger to the welfare of persons in the City of New York where they were possessed.

6. In refusing to hold that the publication possessed by appellant was not a clear and imminent danger to readers of them (R. 51-52).

Outline of Argument

Appellant contends that the judgment of conviction cannot stand because it, and the statute under which it was rendered violate the constitutional guaranty of freedom of the press.

POINT I

The judgment of conviction against appellant should be reversed because it, and the statute under which it was rendered violate the constitutional guaranty of freedom of the press.

(a) The statute restricts freedom of the press. Therefore, if it is unconstitutional, the conviction must be reversed.

Freedom of the press, guaranteed by the First Amendment to the Constitution, has been protected by the Fourteenth Amendment from impairment by the states.

Douglas v. *Jeanette*, 319 U. S. 157, 162.

This Court has held that freedom of the press is in a "preferred position" (*Murdock* v. *Pennsylvania*, 319 U. S. 105, 115), "to be guarded with a jealous eye" (*American Federation of Labor* v. *Swing*, 312 U. S. 321, 325); that in passing upon legislation seeking to repress or control the press, it should be borne in mind that the constitutional provision is "a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow" (*Bridges* v. *California*, 314 U. S. 252, 263); and that

> "Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions" (*Schneider* v. *State*, 308 U. S. 147, 161).

Because of the nature of this right, it was held in *Thornhill* v. *Alabama*, 310 U. S. 88, at page 97:

> "Proof of abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas."

and at page 98:

> "Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression."

A corollary principle is that:

> "The constitutional validity of law is to be tested, not by what has been done under it, but by what may by its authority be done."
>
> *People ex rel. Alpha P. C. Co.* v. *Knapp*, 230 N. Y. 48, 54.

This is because a criminal law cannot be constitutional in some cases, and unconstitutional in others falling within the same class. If it is unconstitutional as to any, it is unconstitutional as to all. (*Murphy* v. *Commonwealth*, 172 Mass. 264, 273); if what is constitutionally protected falls within the statute, the statute is unconstitutional, even though it also covers cases in which it could act constitutionally (*Wynehamer* v. *People*, 13 N. Y. 378, 424-425, 440-442).

(b) If any part of the statute is unconstitutional, the conviction must be reversed.

Since subdivision 2 is in the disjunctive, this raises the question of its validity not merely as a whole, but of each one of the various classes of publications made a crime.

Stromberg v. *California*, 283 U. S. 359, 364-365.

The judgment of conviction against appellant was a general one (R. 30, 5). It did not specify the classification within the statute upon which it rested. As there are several distinct classifications set forth in the statute, and the trial court might have convicted with respect to any one of them, independently considered, it is impossible to say under which one the conviction was obtained. If any one of the classifications is unconstitutional, the conviction cannot be upheld. Any other procedure would be sheer denial of due process.

Stromberg v. *California*, 283 U. S. 359, 367-368;
Williams v. *North Carolina*, 317 U. S. 287.

(c) The degree of repression imposed by the statute is unconstitutional.

Assuming *arguendo* that it might have been competent for the legislature to have passed an act to protect certain specified classes of persons, or to operate upon certain specified types or degrees of crime literature under certain named circumstances (this we dispute, see page 20, *infra*), this is not such an act. It would permit punishment for the publication of "criminal news" alone, or "police reports" alone, as well as "accounts of criminal deeds," or any of the other prohibited subjects; and that, whether

consisting of truth or statistics, as well as fiction. The statute itself is general and all-inclusive, and makes no attempt at distinction or regulation. Its character is such that it strikes at the very foundation of freedom of the press.

Furthermore, the statute, both as written and as applied in the case at bar, has been made for, and is applicable to everybody in the State, as if everyone needed the same protection. It has not been claimed that so broad a restriction is necessary. Its practical application, illustrated by the case at bar, the only time it was applied, renders it unconstitutionally repressive. We may well say of it:

> "The fact that some regulation may be permissible, however, does not mean that the First Amendment may be abrogated. We are not dealing here with a statute, 'narrowly drawn to cover the precise situation' that calls for remedial action (cits.) * * * Prohibition may be more convenient to the law maker, and easier to fashion than a regulatory measure * * * But that does not justify a repressive enactment like the one now before us."

Martin v. *Struthers*, 319 U. S. 141, 151.

This is particularly so because freedom of the press is a right not lightly to be taken away.

(d) The construction given the statute by the Court of Appeals renders it vague and indefinite.

Nor does the construction given the statute by the Court of Appeals alter the situation. As Chief Judge Lehman stated in his dissent, "the statute, as construed by the court, is so vague and indefinite as to permit punishment of the

fair use of freedom of speech" (R. 48). The majority opinion acknowledges that the test formulated by it is indefinite (R. 47), and that under it, the exercise by a person of his constitutional right of freedom of the press would entail risk (R. 47-48). Risks the law sanctions in the exercise of lesser rights should not be suffered where a right that has been termed "the matrix, the indispensable condition, of nearly every other form of freedom," [10] one of "the most cherished policies of our civilization," [11] "essential to the very existence and perpetuity of free government" [12] is involved. The Court of Appeals erred in applying to such a right the rule relating to the exercise of police power over ordinary rights.

The Court of Appeal's construction "blankets with uncertainty whatever may be said." A "sharp line cannot be drawn surely or securely. The effort to observe it could not be free speech, free press" (*Thomas* v. *Collins*, 323 U. S. 516, 535).

The result of the Court of Appeal's construction of the statute would be to leave a publisher or retail storekeeper in doubt as to whether any particular book or magazine would be held within the statute: it would be sheer guesswork on his part, without a foreseeable standard for judgment, or predicability. The test offered is vague, uncertain, indefinite. Different juries or different judges might, under that construction, render different rulings with respect to the same book. Because, under the Court of Appeal's decision, each such finding would be one of fact, and the test is so vague, the Appellate Courts would be bound

10 *Palko* v. *Connecticut*, 302 U. S. 319, 327.

11 *Bridges* v. *California*, 314 U. S. 252, 260.

12 *Ex parte McCormick*, 129 Texas Crim. Rpts., 457, 461.

thereby. The result would be chaos. It would permit excesses in local applications of the statute; the fines might be small, precluding as a practical matter appeals to a higher Court. A sword of Damocles would hang over each publisher who sought to exercise his right of freedom of the press. So fundamental a right should not rest on so tenuous a thread.

This Court held a penal statute unconstitutional on the foregoing grounds in *Connally* v. *General Const. Co.*, 269 U. S. 385, wherein it was held, at page 391:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

The Court, at pages 392-393, quoted with approval from the case of *United States* v. *Capital Traction Co.*, 34 App. D. C. 592, 596, 598:

> "'The statute makes it a criminal offense for the street railway companies in the District of Columbia to run an insufficient number of cars to accommodate persons desiring passage thereon, without crowding the same. What shall be the guide to the court or jury in ascertaining what constitutes a crowded car? What may be regarded as a crowded car by one jury may not be

so considered by another. What shall constitute a sufficient number of cars in the opinion of one judge may be regarded as insufficient by another * * * There is a total absence of any definition of what shall constitute a crowded car. This important element cannot be left to conjecture, or be supplied by either the court or the jury. It is of the very essence of the law itself, and without it the statute is too indefinite and uncertain to support an information or indictment.

* * * The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another.'"

The final conclusion of the Court in that case, at page 395, is applicable to the instant case:

"The result is that the application of the law depends not upon a word of fixed meaning in itself, or one made definite by statutory or judicial definition, or by the context or other legitimate aid to its construction, but upon the probably varying impressions of juries as to whether given areas are or are not to be included within particular localities. The constitutional guaranty

of due process cannot be allowed to rest upon a support so equivocal."

(c) The type of repression is unconstitutional.

We recognize that the right of free speech and a free press is not absolute; that there are certain fields over which the Legislature may exercise proper control. But, the power to restrict is the exception rather than the rule;[13] and the fields within which the legislature may exercise control, and then only to a properly limited and specifically formulated extent,[14] are well-defined and narrowly limited. They are enumerated in *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571-572:

> "Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to invite an immediate breach of the peace."

The matter barred by subdivision 2 concededly does not come within any of the classes above enumerated. The word "lust" in subdivision 2 was not intended to be akin to "lewd and obscene." The rule of *ejusdem generis* shows this; the appellee has conceded it in all the State courts;

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13 *Herndon* v. *Lowry*, 301 U. S. 242, 258.

14 *Martin* v. *Struthers*, 319 U. S. 141, 151.

and the Court of Appeals so stated in its opinion. Those classes should not be enlarged to include the subject-matter of subdivision 2. This is all the more so because of the invalidity, or at the very least, the extreme doubt as to the merits of the reasoning regarding the purpose and effect of subdivision 2.[15] In *Schneider* v. *State*, 308 U. S. 147, 161, this Court held:

> "Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions."[16]

(f) The statute violates the "clear and present danger" principle.

The statute here involved is a direct repression of freedom of the press. The test of the constitutionality of such a statute is not whether there is a "rational connection between the remedy provided and the evil to be curbed," but whether it was enacted "to prevent grave and immediate danger." (*Thomas* v. *Collins*, 323 U. S. 516, 530; *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 639). In applying this test, this Court has established "a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high" (*Bridges* v. *California*, 314 U. S. 252, 263). "Neither

15 See note 9, page 9, *supra*.

16 The wisdom of such a principle is well illustrated by contrasting the reasoning of the State Courts (*supra*, pp. 6-7, 7-9) with the findings of Profs. Glueck, Taft and Adler (note 9, page 9, *supra*).

'inherent tendency' nor 'reasonable tendency' is enough to justify a restriction of free expression" (Id. at p. 273).

Because "the power of a state to abridge freedom of speech and of assembly is the exception rather than the rule" (*Herndon* v. *Lowry*, 301 U. S. 242, 258), and because "any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger" (*Thomas* v. *Collins*, 323 U. S. 516, 530), it seems to follow that the burden is on the State to show why the exception should be invoked in any given case (*Thornhill* v. *Alabama*, 310 U. S. 88, 96).

Not only is the record completely barren of any proof thereon by the State; but the very history of the statute, the fact that, except for the case at bar, it has been a "dead letter law," although similar magazines have openly and freely been sold, and still are, demonstrates conclusively that there is not, and never has been any "grave and immediate danger," [17] let alone a "substantive evil—extremely serious and the degree of imminence extremely high." [18] Nor does concern for the public good justify curtailment of free expression (*Thomas* v. *Collins*, 323 U. S. 516, 545).

In considering the effect of reading crime stories, sequential acts should not be confused with consequential results. The reading of such literature does not cause the commission of crimes.[19]

The long delay in attempting to enforce the statute (during which time there were countless prosecutions throughout the state under subdivision 1), and that there has been almost an entire absence of similar statutes, "is significant

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17 *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 639.

18 *Bridges* v. *California*, 314 U. S. 252, 263.

19 See note 9, page 9, *supra*.

of the deep-seated conviction that such restraints would violate constitutional right."

Near v. *Minnesota*, 283 U. S. 697, 718.

CONCLUSION

The judgment of conviction should be reversed, and the information against appellant dismissed.

Respectfully submitted,

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New York, N. Y.

March 8, 1946.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 3

MURRAY WINTERS,

Appellant,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

APPELLANT'S BRIEF

ARTHUR N. SEIFF,
Attorney for Appellant.

INDEX

Point III

In answer to this Court's questions:

> "3. In view of the construction herein given by the Court of Appeals to subsection 2 of section 1141 of the New York Penal Code, what was the law, binding upon this Court, which governed the acts for which the conviction herein was had? Was the conviction under such controlling law, as applied to this defendant at that time, compatible with the Fourteenth Amendment?"

appellant contends that:

A. The law, binding upon this Court, which governed the acts for which the conviction herein was had, is the law as it was when those acts were committed.

B. The conviction under such controlling law, as applied to this defendant at that time, was not compatible with the Fourteenth Amendment.

C. It makes no difference what law is binding on this Court, whether it be (1) the statute itself as it read when Winters was arrested and the information against him filed, or (2) the statute as construed by the Court of Special Sessions in convicting Winters under the statute so con-

Table of Cases Cited:

Other Authorities Cited:

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APPELLANT'S BRIEF

Statement

This brief is submitted in pursuance of an order of this Court, entered herein on June 23, 1947. That order set forth three questions. There are three Points in this brief. Each Point answers one of those questions, and incorporates, in the Point heading, the question thus answered. This brief is not intended to replace appellant's original brief herein, but is supplemental thereto.

POINT I

In answer to this Court's question:

"1. Is subsection 2 of section 1141 of the New York Penal Code, as construed by the Court of Appeals, compatible with the Fourteenth Amendment?"

it is appellant's contention that the statute, as construed by the Court of Appeals, violates the Fourteenth Amendment's guaranty of freedom of the press.

A detailed analysis of the Court of Appeals' opinion shows that its construction of the statute

(a) covers only a part of the statute, and does not profess to cover every situation to which the statute could be extended;

(b) does not exclude prosecution for proper writings (1) under that part of the statute that is construed, or (2) under those parts of the statute that were not considered by that Court;

(c) establishes as the test of criminal liability one that has been repudiated by this Court, namely, a bad tendency of the writing;

(d) leaves the statute vague and indefinite; and

(e) effects an unconstitutional repression of the freedom of the press.

The majority opinion begins by quoting the statute, that it is directed against "criminal news, police reports, or accounts of criminal deeds, or pictures or stories of deeds of bloodshed, lust or crime," and states that the magazines found in Winters' possession were "composed entirely of such pictures and stories" (R. 45).

It continues with the statement that the "full literal meaning" of the statute, that it condemns the publications named in the statute "regardless of the manner of treatment", may be "dismissed at once on the short ground that its manifest injustice and absurdity was never intended by the Legislature" (R. 45).

It then holds that the statute is concerned with "indecency or obscenity", not as regards "that form of immorality which has relation to sexual impurity" (R. 45), but in the following respect:

> "Indecency or obscenity is an offense against the public order. (9 Halsbury's Laws of England (1st ed.), 530, 538; Harris & Wilshire's Criminal Law (17th ed.), 216; 1 Bishop's Criminal Law (9th ed.), 500, 504.)[1] Collections of pictures or stories of criminal deeds of bloodshed or lust unquestionably can be so massed as to become vehicles for inciting violent and depraved crimes against the person and in that case such publications are indecent or obscene in an admissible sense, though not necessarily in the sense of being calculated or intended to excite sexual passion. This idea, as it seems to us, was the principal reason for the enactment of the statute" (R. 46).

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1 In this the Court of Appeals overlooked the fact that the legislature is not free to punish anything which was criminal at English common law. That was one of the objects of the Revolution—"to get rid of the English common law on liberty of speech and of the press" (Prof. Chafee—*Free Speech in the United States*, pp. 19-20).

The foregoing reveals several significant and important facts.

1—In arriving at, and in giving this definition and construction, the Court of Appeals was considering, and concerned with, (a) "indecency or obscenity" as "an offense against the public order" not related to "sexual impurity," but still only a form of "indecency or obscenity", and not (b) incitement to crime.[2] This is shown not only by the language employed in the above quotation, but also by reading it together with the preceding paragraph of the opinion (as it clearly was intended by the Court of Appeals to be read), with which it forms an integral part of the opinion (R. 45-46).

2—In an earlier part of its opinion the Court of Appeals recognized that the statute was directed against "criminal news" and "police reports" as well as against "accounts of criminal deeds, or pictures or stories of deeds of bloodshed, lust or crime" (R. 45). However, its definition of "indecent or obscene publications" and its construction of the statute were solely concerned with, and limited to that part of the statute that related only to "collections of pictures or stories of criminal deeds of bloodshed or lust." It did not include within its definition that part of the statute that proscribes "criminal news" and "police reports." This leaves the statute still directed against "criminal news" and against "police reports," each expressly included in the statute by the legislature, and not exempted therefrom by the Court of Appeals.

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2 This is further evidenced by a subsequent part of the opinion (R. 47), hereinafter quoted and discussed at pages 6 to 7.

Nor did that Court go into the question of "whether the statute extends to accounts of criminal deeds not characterized by bloodshed or lust" (R. 46).

3—The Court of Appeals did not limit the application of the statute exclusively to "collections of pictures or stories of criminal deeds of bloodshed or lust * * * so massed as to become vehicles for inciting violent and depraved crimes against the person." It stated that "This idea * * * was the principal [not the "sole" or the "exclusive"] reason for the enactment of the statute". This is a tacit admission that there may be other writings to which the statute may be extended. In fact, the Court of Appeals never said that the magazines in this case incited to crime, or that they were "vehicles for inciting * * * crimes." It based its conclusion (set forth in the next paragraph of its opinion [R. 46]) that "the magazines which were taken from the defendant's premises were obnoxious to the statute" on the following description it gave of the contents of the magazines—"The contents are nothing but stories and pictures of criminal deeds of bloodshed and lust. The Appellate Division said: 'The stories are embellished with pictures of fiendish and gruesome crimes, and besprinkled with lurid photographs of victims and perpetrators. Featured articles bear such titles as "Bargains in Bodies," "Girl Slave to a Love Cult" and "Girls Reformatory." ' It is not suggested that any of the contributors was distinguished by his place in the literary world or by the quality of his style (cit.). In short, we have here before us accumulations of details of heinous wrongdoing which plainly carried an appeal to that portion of the public who (as many recent records remind us) are disposed to take to vice for its own sake" (R. 46). Saying that the magazines "carried an appeal" to those "disposed to take to vice for its own sake" is a far cry from saying that they were "vehicles for inciting violent and de-

praved crimes." The Court of Appeals' description of the magazines in this case, coupled with its statement that "the magazines * * * were obnoxious to the statute," shows conclusively its intent to have the statute bar such writings. Surely, such a statute, no matter how much we may dislike these magazines or such writings generally, is an unconstitutional repression of a free press.

4—Although it did not use the word "tendency", the Court of Appeals, in referring to stories of criminal deeds "so massed as to become vehicles for inciting violent and depraved crimes," was establishing the tendency of the magazines as the test of criminal liability. It never spoke of stories that actually incited to crime. Nor did it say that the magazines in question, or any of the stories therein, actually incited to crime. This is shown also by its description of the magazines in the following paragraph of its opinion (R. 46), quoted and discussed in the paragraph numbered "3" immediately preceding this paragraph.

The Court of Appeals did not dispute, but tacitly admitted the appellant's contention that "the criterion of criminal liability [under the statute] is a personal taste standard, uncertain, indefinite and *ex post facto* in its practical operation" (R. 47). It said that this did not render the statute unconstitutional because:

> "In the nature of things there can be no more precise test of written indecency or obscenity than the continuing and changeable experience of the community as to what types of books are likely to bring about the corruption of public morals or other analogous injury to the public order. Consequently, a question as to

whether a particular publication is indecent or obscene in that sense is a question of the times which must be determined as matter of fact, unless the appearances are thought to be necessarily harmless from the standpoint of public order or morality" (R. 47).

It will be noted from this that:

1—The Court of Appeals based its decision on the ground that the statute is directed against books that are "likely to bring about the corruption of public morals or other analogous injury to the public order"; and that it decided that it would be a question of fact in each case "as to whether a particular publication is indecent or obscene in that [the above-quoted] sense" unless the publication was "necessarily harmless from the standpoint of public order or morality." This shows that the Court of Appeals did not limit the application of the statute to books that incite to crime, but included within its scope books "likely to bring about the corruption of public morals or other analogous injury to the public order"; that it considered such books as being "indecent or obscene" within the meaning and application of the statute; and that the only books exempt from prosecution and trial would be those "necessarily harmless from the standpoint of public order or morality."

2—In condemning books that are "likely to bring about the corruption of public morals or other analogous injury to the public order", the Court was establishing as the criterion of criminal liability the tendency of the book. The language used by the Court shows this conclusively.

Such a criterion renders the statute an unconstitutional attack upon the liberty of the press (*Bridges* v. *California*, 314 U. S. 252, 263, 273; *Thomas* v. *Collins*, 323 U. S. 516, 530, 545; Prof. Chafee on *Free Speech in the United States*, pp. 26-27, 35). Prof. Chafee, in his book *Free Speech in the*

United States, after examining the cases on the subject, comes to the conclusion that "the most essential element of free speech is the rejection of bad tendency as the test of a criminal utterance" (p. 28), and the "we can with certitude declare that the First Amendment forbids the punishment of words merely for their injurious tendencies" (p. 35).

Parenthetically—as regards writings that incite to crime, there is no need for a new statute, because the ordinary standards of criminal solicitation or attempt apply.

3—The Court of Appeals' holding was that it would be criminal under the statute to publish any book that "the continuing and changeable experience of the community" [3] thought would be "likely to bring about the corruption of public morals or other analogous injury to the public order", unless that same "continuing and changeable experience" thought "the appearances * * * to be necessarily harmless from the standpoint of public order or morality." [4]

The phrases—"the continuing and changeable experience of the community"—books "likely to bring about the corruption of public morals" [5]—books likely to bring about "other analogous injury to the public order" [5]—and the

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3 The Court did not state how this "experience of the community" would show itself, especially in so controversial a subject as this, involving a completely subjective estimate as to whether a certain book would be "likely to bring about the corruption of public morals or other analogous injury to the public order." Evidently, the "experience" would be expressed by the particular trier of the facts in the individual case before it, whether judge or jury. Another problem poses itself in connection with this. Would their finding be subject to review on appeal? The importance of this question will appear shortly hereafter in this brief.

4 It should be noted that the Court speaks of public morals *or* public order, and again, of public order *or* morality—each time in the disjunctive—showing its intention to hold each, separately and independently of the other, protected by the statute.

5 The Court of Appeals put in the disjunctive these two different effects

fact that the Court held that each case would involve a question of fact unless "the appearances are thought to be necessarily harmless" [6] (R. 47)—make the statute "so vague and indefinite as to permit punishment of the fair use of freedom of speech." [7] There is no recognizable standard or dividing line between the criminal and the lawful. Under the Court of Appeals' construction, it becomes, in effect, a statute that makes punishable any book "detrimental to the public interest when (harmful) in the estimation of the court and jury."[8] Such a "standard that is so vague and indefinite as to be really no rule or standard at all" is invalid.[9] The statute, so construed, becomes a "dragnet which may enmesh anyone" (*Herndon* v. *Lowry*, 301 U. S. 242, 263). The applicability of the statute, and the consequent criminality of a publisher or storekeeper selling books would be left to conjecture and speculation.[10] The Court of Appeals' construction "blankets with uncertainty what might be written. A sharp line cannot be drawn surely or securely. The effort to observe it could not be free speech, free press." [11] Publishers and storekeepers would run a risk as to each new book falling within the general subject matter or within any one of the classes enumerated in the statute. Each new book and each new case would require the draw-

6 Even the meaning of this phrase is not clear.

7 Chief Judge Lehman's dissenting opinion (R. 48).

8 *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, 89.

9 *Champlain Refining Co.* v. *Commission*, 286 U. S. 210, 243; *Small Co.* v. *American Sugar Refining Co.*, 267 U. S. 233, 239.

10 "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids" (*Lanzetta* v. *New Jersey*, 306 U. S. 451, 453).

11 *Thomas* v. *Collins*, 323 U. S. 516, 535.

ing of a new line. To hold a prison sentence before a publisher, or bookseller, and to call him free to publish, or sell, is patently ridiculous. The mere threat of the statute and the uncertainty of its applicability, would be an effective deterrent on freedom of the press, even as to rights properly exercised. The fear of prosecution, the expense of defense, the ignominy of being termed a criminal, would discourage the publication, or sale, of books in that general field, and thus would accomplish an effectual repression of a free press in this field of writing. A storekeeper selling books at retail is given no measurable standard by which he could judge whether any book in that field would be held legal or criminal. He would be compelled to risk jail as to each new book, since, under the Court of Appeals' construction, it would be a question of fact in each case, so that he could not know how he stood until the jury rendered its verdict. He would therefore be impelled, through fear, not to sell any book in that field, even though he sincerely believed certain books to be proper. A retailer is in a particularly vulnerable position. The expense of defense would eat up his small profits from the sale of any particular book, so that practical considerations would compel him to give up his constitutional rights without a fight, even though he was in the right. Private censors know this, and act on it. Freedom of the press might be destroyed by their nibbling at the retailer, rather than attacking publishers who might fight back.

Not only would "the continuing and changeable experience of the community" [12] be different in the community at different times, but it would be different in different parts of the community (New York State) at the same time. We

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12 By the community the Court of Appeals must have meant the State of New York, since the statute is a State statute applicable in all parts of the State.

all know that there are different standards and different concepts in the different parts of the state—rural, urban, metropolitan. We know that this is so even in the same local part of the state, the same town or city. This is a highly controversial and subjective matter. Whether a storekeeper selling a book would be branded a criminal would not depend on any test ascertainable to him or to any other citizen, whether of average intelligence or even though endowed with a super-intellect. Let us see what this could lead to:

Bookseller Jones in New York City sells a book, confident that no judge or jury in that city would condemn the book. A person who makes it his business (unofficial, and with no public standing) to censor what the public may read, knows this, and so does nothing about that book in New York City. But, he also knows that a conviction may be obtained in another part of the State. So, he proceeds to that other part of the State; lodges a complaint against a bookseller there; and a conviction follows. Does this mean that the sale of that book is criminal throughout the State, even in localities where the "experience of the community" would exonerate it; or that it is criminal only in the particular locality where the conviction was had? It must be remembered that the statute is a State statute and applies to the whole State. Suppose that censor were then to lodge a complaint against Jones in New York City, based on the same book on which a conviction had already been obtained elsewhere. The conviction of the other bookseller in the other part of the State can't deprive Jones of his right to have a New York City jury pass upon the book. This is a criminal charge, and Jones sold his book in a part of the community where the "experience of the community" would exonerate him. It may even be that the charge against him might be based on a sale made by him before the conviction

was obtained in the other case. A criminal statute is broken or observed when the act charged is committed. An acquittal of Jones[13] leaves the book—where? Is it criminal or legal to sell it in New York State? Is it criminal in the locality where the conviction was had, and legal in the locality where there was an acquittal? What is its status in other parts of the State? There would be no way of telling except after a prosecution and trial in each individual locality. The result would be chaos.

The very least that would follow would be a jockeying as to the venue of criminal prosecutions on the same book between private censors and prosecutors on the one hand and publishers on the other. The power and resources of private censors should not be underestimated. It would bring the law into great disrepute. And all because, as the Court of Appeals has held, a jury's verdict (except as to books "necessarily harmless") would be the only way to tell whether the statute has or has not been violated. The constitutional guaranty of a free press cannot be allowed to rest upon a support so equivocal. It is not an ordinary right that is involved. Because of "the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment," "that priority gives these liberties a sanctity and a sanction not permitting dubious intrusions" (*Thomas* v. *Collins*, 323 U. S. 516, 529, 537). When, as here, there is a legislative invasion of the civil liberties protected by the First Amendment, there is no presumption of the constitutionality of the statute (*United States* v.

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13 It makes no difference whether he sold the book before or after the conviction of the other bookseller. He still has a right to a trial before the trier of the facts, judge or jury, in New York City, where he sold his book, before he can be found guilty. Or, are we to say that every prosecution after the conviction of the other bookseller must be held in the same locality and before the same trier of the facts as in that prior case?

Carolene Products, 304 U. S. 144, 152; *Hague* v. *C. I. O.*, 307 U. S. 496). In fact, the burden of sustaining the statute would appear to be on the State. Since "the power of a state to abridge freedom of speech * * * is the exception rather than the rule" (*Herndon* v. *Lowry*, 301 U. S. 242, 258), and "any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger" [14] (*Thomas* v. *Collins*, 323 U. S. 516, 530), it follows that the burden is on the State to show why the exception should be allowed in any given case (*Thornhill* v. *Alabama*, 310 U. S. 88, 96).

When appellant pointed out to the Court of Appeals that under this statute the "publication of any crime book or magazine would be hazardous," the Court said that it believed "this assertion to be an exaggeration; but the point is of little account in any event, since 'the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree' (*Nash* v. *United States*, 229 U. S. 373, 377)." In addition to the *Nash* case, which involved the Federal Anti-Trust Act, the Court cited *Dixon* v. *New York Trap Rock Corp.*, 293 N. Y. 509, a nuisance action [15] (R. 47). Two

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14 None of the state courts found that there was a clear and present danger: none of them discussed that.

15 In support of this position of the Court, appellee, at page 9 of its brief in this Court, cites as additional authorities *Rosen* v. *United States*, 161 U. S. 29; *Fox* v. *Washington*, 236 U. S. 273; *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497; *United States* v. *Kagen*, 314 U. S. 513; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568. None of these cases is applicable to, or controlling on the instant case, for the following reasons. The *Rosen* case was decided on the "tendency" of the writing—this doctrine has since been repudiated (*Bridges* v. *California*, 314 U. S. 252, 273; *Thomas* v. *Collins*, 323 U. S. 516, 530, 545; Prof. Chafee's *Free Speech in the United States*, pp. 26-27, 35). The *Fox* case concerned a statute that was expressly directed against writings inciting the commission of crime, breach of the peace or act of violence. The *Hygrade Provision Co.* case involved fraud in the sale of non-kosher meat as kosher meat. The *Kagen* case was an evasion of income

things stand out in this statement of the Court of Appeals. First—it did not say that there was no hazard: it merely called the hazard to publication an exaggeration. Second—it overlooked the fact that the risk entailed in its indefinite construction, with no definite standard, makes the exercise of the right hazardous. The manner of operations of private censors adds to this hazard.

In saying that such a hazard is "of little account," and in citing in support of that statement an Anti-Trust Act case and a nuisance case, the Court of Appeals completely overlooked the fact that freedom of the press, protected by the First and Fourteenth Amendments to the Constitution, is not an ordinary right, to be treated as an ordinary right. The Court of Appeals was granting to the *malum prohibitum* created by this statute priority over the Constitutional guaranty of a free press, as though the latter were on a lower (or, at the most, on an equal) plane with the former. Where there must be a weighing of conflicting interests, the First and Fourteenth Amendments give binding force to the principle that freedom of the press should be granted priority.

In the concluding paragraph of its opinion, the Court of Appeals stated that "the defendant lastly argues for a fresh conception of freedom of the press under which the heretofore accepted requirements of decency would no longer be operative against obscene publications." I will set forth in full that portion of my brief in the Court of Appeals to which that Court was referring, so that this Court may see what the Court of Appeals called "a fresh conception of freedom of the press."

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tax case. The *Chaplinsky* case involved "a statute narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace" (315 U. S., p. 573).

"Even accepting *arguendo* the Appellate Division's version of the statute, that it is aimed exclusively at printed matter which tends to demoralize the minds of its more impressionable readers, the statute still would be unconstitutional. Such a tendency is not sufficient to justify repression of the constitutional guaranties of freedom of the press.

"In the *Bridges* case,[16] it was held, at page 173, that 'neither "inherent tendency" nor "reasonable tendency" is enough to justify a restriction of free expression.'

It should be borne in mind (1) that during the 60 years subdivision 2 has been on the books, it has never been enforced, and (2) that magazines such as are involved in this case have been published and sold freely and openly during that period, and still are, for that matter.

To make the test of the illegality of a book about crimes its tendency to demoralize the minds of its more impressionable readers would bar all crime books. This court, in *People* v. *Muller*, 96 N. Y. 408, 411, overruled a like test suggested for subdivision 1:

> 'If the test of obscenity or indecency in a picture or statue is its capability of suggesting impure thoughts, then indeed all such representations might be considered as indecent or obscene. The presence of a woman of the purest character and of the most modest behavior and bearing may suggest to a prurient imagination images of lust, and excite impure desires, and so may a picture or statue not in fact indecent or obscene.'

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16 *Bridges* v. *California*, 316 U. S. 252, 273.

> There is no way of anticipating the effect of any book on crimes, no matter how the subject may be treated, upon a more impressionable reader. Such a criterion is wrong. In any event, the statute itself, as enacted by the legislature, does not establish any such criterion."

The balance of my brief in the Court of Appeals was devoted to distinguishing the cases cited in the Appellate Division's opinion.

In the course of its opinion, the Court of Appeals said, as though it were a factor having a bearing on its decision, that "It is not suggested that any of the contributors [to the magazines in this case] was distinguished by his place in the literary world or by the quality of his style" (R. 46). Any discrimination in the application of the statute based on such a distinction should be rejected as unworthy, as well as unconstitutional because not affording all writers equal protection of the law. Just as it has been held that the right of free press is not confined to any field of human interest,[17] so it should be held that the right of free press is not confined to eminent writers or to writings of quality.

Nowhere in its opinion did the Court of Appeals consider whether there was a clear and present danger justifying the statute. Appellant has shown, at pages 21 to 23 of his original brief in this Court, that the clear and present danger principle and its application to the instant case demonstrate the unconstitutionality of the statute. To avoid repetition, this Court is respectfully referred to appellant's original brief on that point.

The statute itself provides (and the Court of Appeals' construction has not changed it in that respect) that it is directed against publications "principally made up of" the

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17 *Thomas* v. *Collins*, 323 U. S. 516.

described writings. The quantitative factor—"principally" *versus* single or multiple features—in disregard of the qualitative element that would enter into the question of whether any specific publication has the effect the court seeks to guard against, constitutes an unreasonable classification, and does not afford equal protection of the law. Under such a statute, a 60 page book wholly made up of such stories, would be a violation of the statute, but a 400 page book of which 150 pages contained such stories (they might even include all the stories of the former (60 page) book, and more, to make up the 150 pages of such stories) would not be a violation of the statute. This is not fanciful reasoning. The statute itself allows such a result because that is the way it is worded. Under this statute, a single terribly vicious and harmful story, or even several such, would not be a violation, where such story or stories were a small part of a larger magazine or book, whereas a number of milder stories would be a violation if they constituted the principal contents of a magazine or book. Harmful effect, assuming *pro arguendo* that it could follow such reading, could as easily follow reading the former as the latter. The entire nub of the question is ignored and disregarded by such a statute. This is not a statute " 'narrowly drawn to cover the precise situation' that calls for remedial action": it is not regulation: it is prohibition (*Martin* v. *Struthers*, 319 U. S. 141, 151).

No matter how much we may dislike the particular magazines involved in this case, and no matter how lofty may be the ideals of those who would suppress them, a Constitutional right is at stake here, and it should be safeguarded by all who have sworn to uphold the Constitution. Bad taste does not render the magazines outlaw. Lofty ideals should not be permitted to whittle away our Bill of Rights.

This is especially necessary in a case like this. Where writings meet general approval, no effort to maintain them would be needed.

If it be argued by appellee that some part of what has been said herein about subsection 2 (the statute involved in this case) might be said about subsection 1 (the obscenity statute, not involved in this case), the answer is that our national policy, as manifested by the constitutional guaranty of a free press contained in the Federal Constitution and in the Constitutions of every State of the Union, and the totality of objections to subsection 2, as set forth above, and the absence of limitation on subsection 2 by judicial definition, enjoin an additional restriction on the freedom of the press.

POINT II

In answer to this Court's question:

> **"2. In view of such construction, assuming the answer to the first question is in the affirmative, was the conviction herein compatible with the Fourteenth Amendment, considering the state of the law to have been what it was at the time that the acts were committed for which the conviction was had?"**

it is appellant's contention that because (a) the statute, as construed by the Court of Appeals, was "designed exclusively to outlaw 'vehicles for inciting violent and depraved crimes against the person,'" [18] and (b) the conviction herein was not based on such a statute, but on a different construction of the statute under which the statute clearly and undoubtedly constituted an unconstitutional repression of a free press, and (c) appellee was never given an opportunity to defend himself under the statute as construed by the Court of Appeals; that therefore the conviction herein and the affirmance of *that* conviction by the Court of Appeals on *its* construction violate the Fourteenth Amendment's guaranty of (1) a free press and (2) due process.

(a) The proceedings in the state courts, and (b) the way in which the Court of Appeals' construction of the statute came into being, and (c) the application of the statute as so construed to appellant, (1) deprived him of a full hear-

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18 I am accepting (*pro arguendo* only), for the purpose of this Point, the appellee's statement as to what the Court of Appeals' construction made the statute (appellee's original brief in this Court, pp. 7-8. See also, to the same effect, pp. 5, 6 and 10 of the same brief).

ing and of his defenses under the statute; (2) deprived him of due process; and (3) in practical effect and operation made the statute construed in this manner an *ex post facto* law with respect to the appellant.[19]

Winters was never, not even in the Court of Appeals, confronted with, or charged with violating, or tried under, or given a chance to defend himself against, or convicted of violating a statute such as the Court of Appeals finally[20] declared it to be.[21]

On August 10, 1942, Winters was arrested when an agent of the New York Society for the Suppression of Vice found in his store on that day a number of copies of the magazines in this case (R. 6-7).

On December 2, 1942, the District Attorney of New York County filed an information against Winters in the Court of Special Sessions of the City of New York. The information contained five counts. The first three charged a violation of subsection 1 of section 1141[22] (R. 2-3), and may be disregarded because Winters was acquitted on those counts (R. 5). Counts 4 and 5 (on which Winters was convicted) charged a violation of subsection 2 of Section 1141. These two counts are identical, except that each concerns a different issue of the magazine. They charged that the law was violated in that the magazines were "devoted to the publication and principally made up of criminal news, police reports, and accounts of criminal deeds, and pictures and

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19 That the statute as construed by the Court of Appeals does not apply to the magazines appellant had in his store is discussed in Point III *infra*.

20 This was 2½ years after Winters was tried and convicted, and 6 months after the appeal was argued in the Court of Appeals.

21 See subdivision (a) of this Point's heading, on page 19, *supra*, and note 18, on page 19, *supra*.

22 Subsection 1 banned "obscene, lewd, lascivious, filthy, indecent or disgusting" books, magazines, and other writings.

stories of deeds of bloodshed, lust and crime" (R. 4). They charged every classification enumerated in the statute, and practically in the language of the statute as it was written by the legislature.[23]

On January 19, 1943, Winters was tried in the Court of Special Sessions of the City of New York. That court acquitted him on the first three counts, and convicted him on the ground that the magazines were composed of "lurid, crazy material"; "the manner in which—is treated and handled and set up in the magazine—the typography, and the language used to depict these crimes—that we feel brings it within the prohibition of subdivision 2" (R. 24).

On January 27, 1943, judgment of conviction was pronounced on Winters by the Court of Special Sessions (R. 5). All that the Court said at that time was, "Well, we think that the magazine comes within the subdivision—within the prohibition of the subdivision. Whether or not it is constitutional is another matter" (R. 33). The Court did not pass on that constitutionality.

It will be noted at this point that nowhere in the statute itself, or in the information filed by the District Attorney against Winters, or in the holding of the Court of Special

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23 The part of counts 4 and 5 which refers to the magazines as "obscene, lewd, lascivious, filthy, indecent and disgusting" should be disregarded as surplusage. That is the language used in subsection 1 of section 1141; and the pleader used it in the first three counts of the information which charged a violation of subsection 1. Although the pleader also used these words in counts 4 and 5, it is conceded that these counts have not been brought under subsection 1, but under subsection 2 which has no reference whatever to these words. Subsection 2 is not concerned with "obscene, lewd, lascivious, filthy, indecent and disgusting" writings, but with writings made up of "criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime." And, this last is the language used by the pleader in describing with particularity in the information (as required by the law in New York) the contents of the magazines herein. Furthermore, the Court of Appeals expressly repudiated any construction of subsection 2 which would make it in any manner a "reduplication of subdivision 1" (R. 45).

Sessions, was there any hint that the statute was a statute such as the Court of Appeals eventually held it to be.

On February 24, 1943, Winters appealed from the conviction (this is the only conviction in this case) to the Appellate Division of the Supreme Court of the State of New York (R. 1-2). In that court, the appellee, The People of the State of New York, in their brief in support of the conviction, clearly and unmistakably stated what they understood the statute to mean, and the ground on which they understood Special Sessions to have based the conviction. At page 2 of their brief, they said that the magazines, "purporting to be a compilation of reports from police records and files, presents, in vivid and exciting fashion, narrations focusing about crimes of bloody violence and lust. As a consequence, he [Winters] was tried and convicted of violating section 1141, subdivision 2 of the Penal Law, which stamps as criminal the possession, with intent to sell, of this sort of literature."

In support of the argument

> **"A. The magazines were objectionable within the meaning of the applicable statute."**

appellee said, at page 6 of their brief,

> "It [subsection 2] is aimed solely at publications which, for the purpose of exciting attention and commanding circulation, present in vivid and striking fashion tales of bloodshed, crime, and lust; and which as a result of their flaming and expressive portrayals, tend to influence and demoralize the minds of their more impressionable readers."

This was the entire gist of the People's argument in the Appellate Division as to (1) what the statute meant, and

(2) the ground on which Special Sessions had convicted Winters, and (3) the description of the contents of the magazines alleged to violate the statute.

On May 19, 1944, the Appellate Division affirmed the conviction (R. 36-37). It rendered an opinion in which it adopted the construction of the statute and the description of the magazines urged by the People. In its opinion it referred to the "magazines which purported to contain true cases of crimes from police records and files" (R. 37); stated that

> "They contain a collection of crime stories which portray in vivid fashion tales of vice, murder and intrigue. The stores are embellished with pictures of fiendish and gruesome crimes, and are besprinkled with lurid photographs of victims and perpetrators." (R. 38);

and held:

> "That such publications tend to demoralize the minds of their more impressionable readers cannot be doubted. The statute which is aimed at restraining the publication and sale of such printed matter, we think, is a legitimate exercise of the police power of the state in that it is designed to promote the general welfare and to protect the morals of the community" (R. 38).

Further on in its opinion, the Appellate Division held:

> "It [subsection 2] is aimed exclusively at printed matter which presents tales of bloodshed, crime or lust in a manner which *would have a tendency* to demoralize its readers and *would be likely* to corrupt the morals of the young and lead them to immoral acts" (emphasis mine) (R. 39).

The Appellate Division, in support of its above holdings, cited and quoted from the case of *People* v. *Gitlow*, 234 N. Y. 132, 137, affirmed *Gitlow* v. *New York*, 268 U. S. 652 that part of the opinion of the Court of Appeals which sustained the right of the legislature to enact a statute abridging the freedom of the press on the ground of a bad tendency of the writing (234 N. Y. 132, 137). In so doing, the Appellate Division overlooked the fact that this court, in *Bridges* v. *California*, 314 U. S. 252, 263, 273, has overruled that doctrine.

It will be noted at this point that nowhere in the Appellate Division was Winters called upon to meet and defend himself against a statute such as the Court of Appeals eventually declared it to be. Nor was the Appellate Division acting under such a statute when it sustained his conviction.

There can be no doubt as to the unconstitutionality of the statute construed as it was by the Appellate Division. This has been gone into at length in appellant's original brief, and in Point I of this brief. It was this construction that appellant addressed himself to, in the Court of Appeals; and argued as being unconstitutional; and it was this construction that the appellee argued to sustain.

The People's brief in the Court of Appeals stated that defendant was found in possession of "magazines presenting in vivid and exciting fashion, tales of vice, murder, and intrigue. The immoralities forming the subject matter of the stories are sketched in intimate detail. In addition, sensational photographs of victims and perpetrators of fiendish murders and other acts of immorality and depravity embellish the pages" (p. 2). The People then stated that

> "As a consequence [of possessing such magazines], the defendant was convicted of violating subdivision 2 of section 1141 of the Penal Law, which condemns the

possession, with intent to sell, of printed matter 'devoted to * * * and principally made up of' tales of bloodshed, lust and crime" (p. 2).

The argument of the People in the Court of Appeals was:

"A. The Appellate Division properly construed the provision in question" (p. 4).

and

"B. The statute, as so construed, is valid and constitutional" (p. 8).

In support of their above argument *A*, the People stated, at page 4 of their Court of Appeals brief:

"An examination of section 1141 of the Penal Law, in its entirety, establishes that *subdivision 2* thereof *was intended to condemn,* precisely as noted by the Appellate Division (*supra,* p. 3), *only such printed matter which presents tales of crime 'in a manner that would have a tendency* to demoralize its readers *and would be likely* to corrupt the morals of the young and lead them to immoral acts," (emphasis mine).[24]

and at page 5:

"It is reasonable to assume, therefore, that, in enacting subdivision 2, the legislature intended to condemn only such crime literature which, like its obscene and indecent counterparts, *tends 'to deprave or corrupt those whose minds are open to' the immoralities suggested*" (emphasis mine).[24]

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24 See footnote 8 at pages 6 to 7 of appellant's original brief, and Point I of this brief; showing the unconstitutionality of such a test of criminal liability.

and at page 7, that "the legislation does not seek to suppress all publications dealing with scandals and immoral conduct but simply those presenting items of that nature in a concentrated fashion and with such detail that a tainting of the social atmosphere and an impairment of the morals of the young would be likely to ensue."

In support of their above argument *B*, the People stated, at page 8 of their brief:

> "As we have shown, subdivision 2 of section 1141 aims exclusively at printed matter which presents crime stories in a manner calculated to impair public morals. That being the case, its validity is unquestionable."

At page 10 of their brief, the People described the magazines as "of such a nature that their tendency 'to demoralize the minds of their more impressionable readers' cannot be doubted."

It was to this argument, outlined above, that appellant adressed himself in the Court of Appeals. There can be no question that such a statute, so construed, is unconstitutional. Appellant has shown this in his original brief, and in Point I of this brief.

The appeal was argued in the Court of Appeals in January, 1945. That Court delivered its opinion on July 19, 1945 (R. 44). Then, for the first time, was the statute held to be "designed exclusively to outlaw 'vehicles for inciting violent and depraved crimes against the person' (R. 46)." [Appellant is here accepting, *pro arguendo* only, the description given by the appellee to the Court of Appeals' construction of the statute (appellee's original brief in this Court, pp. 7-8)]. But, Winters had never been charged with violating *such* a statute. He had not been tried under *such* a statute. Most particularly, he had not been convicted by

Special Sessions of violating *such* a statute. He had never been given an opportunity to require proof against him, and to defend himself under such a statute—neither in the information against him, nor on his trial, nor on any of his appeals, not even in the Court of Appeals. Winters' reliance on the wording of the statute, and the wording of the information charging him with what the People alleged constituted the crime, and the construction given the statute on his trial, dictated his defense. The construction of the statute he was confronted with in the Appellate Division and in the Court of Appeals dictated his defense in those courts. The charge in the information, the line of argument by the People in all the State courts, the construction by Special Sessions and by the Appellate Division, and Winters' consequent line of defense, became a trap as a result of the ultimate change of construction by the Court of Appeals. Surely, he had a right to rely on what preceded that ultimate construction. He was entitled to know the specific charge against him, and to defend himself against *that* charge. He was not compelled to anticipate the innumerable possible constructions that *might* be placed on the statute, including the one eventually given by the Court of Appeals. There was a charge against him. That one he met and overcame.

> "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."
>
> *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453.

I don't think it can be disputed that the statute, as the legislature actually wrote it, and as it actually read before the Court of Appeals' construction came into existence, and

as anybody, reading it, would understand it before the Court of Appeals construed it, that such a statute was unconstitutional as being too broad, general, all-inclusive, and as improperly abridging freedom of the press. It was the statute read this way that Winters was charged, by the information, on December 2, 1942, with violating (R. 4).

Nor can it be disputed that the conviction of Winters by the court which convicted him, and which was the only court in this case which had the power to convict him, *i.e.*, Special Sessions, the court in which he was tried, and which was the only trier of the facts in the entire history of this case, that the conviction in that court, in January, 1943, was based on an unconstitutional construction of the statute. It was then, in January, 1943, and on that statute, construed and understood that way, that Winters was convicted by the Court of Special Sessions. The invalidity of that conviction by that court was established then and there. What followed could not undo what had been done. What followed could not validly act *nunc pro tunc*. The practical effect of what followed was in the nature of an *ex post facto* enactment and ruling. The Court of Appeals sustained *that* conviction, unconstitutional when rendered, by bringing into being, 2½ years after Winters had been charged, tried, and convicted, a new and different construction of the statute. This deprived Winters of his right to a trial on the ground and charge on which the conviction is now sought to be sustained. It did away with the requirement before the trial court, the triers of the facts, of essential elements of the crime so enunciated by the Court of Appeals, *e.g.*, whether such a statute was justified by a clear and present danger, and whether the magazines in this case came within the statute so construed by the Court of Appeals. It deprived Winters of a hearing thereon, and of an opportunity to be heard in his defense thereon before

the court which tried him, or before any court, including the Court of Appeals. It operated on past acts of Winters, and on the past charge against him, and on his past trial, and on his past conviction. It ignored his right to be charged, and to be tried, and to be heard in his defense on the statute as thus construed. He was given no chance to meet, and to defend himself against such a construction; or to be heard that there was no clear and present danger that would justify such a statute, so construed;[25] or to be heard that the magazines did not come within the statute so construed. He was deprived of any chance whatever to be heard on his behalf on these points in any court, including the Court of Appeals. And all this was done to sustain and prefer a *malum prohibitum* over the Constitutional guaranties of a free press and due process.

Such a procedure also ignored Winters' rights arising out of his having been charged, tried, and convicted under the statute as it read and was understood at the time he was charged, tried, and convicted.

Appellee's present argument, in effect, is that the decision and construction of the Court of Appeals in July, 1945 validated the illegal conviction of Winters rendered in January, 1943.

This should not be permitted. It would be a most dangerous principle to say that due process exists where a conviction, illegal at the time rendered, becomes valid as the result of a subsequent construction of the statute so arrived at. The practical working effect of such a procedure is most certainly *ex post facto* in fact and in effect, if not

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25 The Court of Appeals' opinion shows that it never even considered this factor. Not having anticipated such a construction (nobody, including the People, anticipated it: this is shown by their briefs and arguments in the State courts), Winters was deprived of his chance to raise, and to be heard on this point.

in name. Under such circumstances, any statute relating to restriction of the press, no matter how invalid on its face, would act as a previous restraint in working effect. A free press would not exist under such circumstances; there would always be the danger of some subsequent strained construction, depriving the writer, publisher, or seller of any chance to be heard in his defense.

The change of the charge against Winters, and the change of the theory of prosecution (2 1/2 years after the conviction, and long after he had been heard in his defense on the original charge), by means of the Court of Appeals' construction, was a change of law as thoroughly and as effectively as though by legislative enactment or amendment under similar circumstances.

These conclusions, founded on reason and justice, find support in adjudications of this Court. This Court has held that

> "in passing upon constitutional questions the court has regard to substance and not to form" (*Near* v. *Minnesota*, 283 U. S. 697, 708);

that

> "The question whether a state law deprives a party of rights secured by the Federal Constitution depends not upon how it is characterized, but upon its practical operation and effect" (*Mountain Timber Co.* v. *Washington*, 243 U. S. 219, 237);

that

> "Our concern is with realities, not nomenclature" (*Senior* v. *Braden*, 295 U. S. 422, 429);

that this Court, in deciding whether Winters was deprived of due process, may examine the entire history of this case (*Fiske* v. *Kansas*, 274 U. S. 380), and must determine the justice or injustice of what happened in the light of the whole record (*Snyder* v. *Massachusetts*, 291 U. S. 97, 114, 115);

that this Court is "free to inquire whether the Statute as *interpreted and applied* by the State Court denies rights guaranteed by the Constitution" (emphasis mine) (*North Laramie Land Co.* v. *Hoffman*, 268 U. S. 276, 282);

and that

> "the controlling test is to be found in the operation and effect of the law *as applied and enforced* by the State" (emphasis mine) (*St. Louis S. W. Ry.* v. *Arkansas*, 235 U. S. 350, 362).

(a) Accepting the Court of Appeals' construction of the statute, and (b) assuming the statute so construed to be a valid exercise of the police power; when we consider (1) that Winters was not tried and convicted under that construction, but under a totally different construction, and (2) the manner in which, and time when the Court of Appeals' construction was arrived at, and (3) that the practical effect of the *Court of Appeals applying and enforcing that construction* in this case, at the time it did, operated to deprive Winters of an opportunity to meet that construction and to defend himself thereunder; the conclusion is compelling that Winters was arbitrarily deprived of his right to due process under the Fourteenth Amendment.

> *Abie State Bank* v. *Bryan*, 282 U. S. 765, 772;
> *Snyder* v. *Massachusetts*, 291 U. S. 97, 114, 115;
> *Poindexter* v. *Greenhow*, 114 U. S. 270, 295.

The *Snyder* case also held, at page 116:

> "A defendant who has been denied an opportunity to be heard in his defense has lost something indispensable, *however convincing the ex parte showing.*" (emphasis mine.)

Particularly applicable to the instant case is this Court's holding in *Chicago, Burlington and Quincy R.R. Co.* v. *Chicago,* 166 U. S. 226, at pp. 234-235:

> "But a State may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it may be that its final action would be inconsistent with that amendment. In determining what is due process of law regard must be had to substance, not to form. This court, referring to the Fourteenth Amendment, has said: 'Can a State make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation.' *Davidson* v. *New Orleans,* 96 U. S. 97, 102. The same question could be propounded, and the same answer should be made, in reference to judicial proceedings inconsistent with the requirement of due process of law."[26]

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26 All State agencies, including the judiciary, are forbidden to take any action that would impair due process. *Ex parte Virginia,* 100 U. S. 339.

It should always be borne in mind that

> "while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation"; that "a degree of elasticity is thus imparted, not to the *meaning*, but to the *application* of constitutional principles" (*Euclid* v. *Amber Co.*, 272 U. S. 386, 387).

Due regard must be had to the nature of the proceedings (criminal, based on a *malum prohibitum*), and to the character of the rights affected (the constitutional guaranties of a free press and of due process).

POINT III

In answer to this Court's questions:

"3. In view of the construction herein given by the Court of Appeals to subsection 2 of section 1141 of the New York Penal Code, what was the law, binding upon this Court, which governed the acts for which the conviction herein was had? Was the conviction under such controlling law, as applied to this defendant at that time, compatible with the Fourteenth Amendment?"

appellant contends that:

A. The law, binding upon this Court, which governed the acts for which the conviction herein was had, is the law as it was when those acts were committed.

B. The conviction under such controlling law, as applied to this defendant at that time, was not compatible with the Fourteenth Amendment.

C. It makes no difference what law is binding on this Court, whether it be (1) the statute itself as it read when Winters was arrested and the information against him filed, or (2) the statute as construed by the Court of Special Sessions in convicting Winters under the statute so construed, or (3) the statute as construed by the Appellate Division in affirming that conviction, or (4) the statute as construed by the Court of Appeals in affirming that conviction. In each instance, the conviction under such controlling law, whichever it was, as applied to this defendant at that time, was not compatible with the Fourteenth Amendment.

A

Present day standards of justice, the requirements of the due process clause, and adjudications of this Court compel the conclusion that the law, binding upon this Court, which governed the acts for which the defendant was convicted, is the law as it was when those acts were committed. That is the law under which the defendant was arrested, tried and convicted. That is the law with which he was confronted, and against which he defended himself.

To say that this Court is bound by the law as construed by the Court of Appeals—a construction that did not come into existence until years after Winters had been arrested, tried and convicted—a construction under which he had not been tried or convicted—a construction so different from the law as it was when he was arrested, that nobody, not even the People of the State of New York, ever considered it—such a decision would be diametrically opposed to the actual facts, and would be so unfair and unjust as to shock the conscience. It would give the Court of Appeals' construction a retroactive effect. It would of necessity be based, not on fact, but, on a legal fiction, *i.e.*, that in 1884 the statute was written, not as the legislature actually wrote it, but, as the Court of Appeals construed it in 1945.[27] As has been shown in Point II, *supra*, the practical effect of such a decision would be to deprive the defendant of an opportunity to defend himself on the ground on which his conviction was founded by the appellate court.

This Court should not permit a legal fiction to be accorded greater veneration than, and to prevail over the

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27 The People, in note 2 on page 6 of their original brief in this Court, have argued for such a rule. Their argument, and the cases cited by them, will be answered shortly hereafter.

constitutional guaranties of due process and freedom of the press.

Such a legal fiction would nullify this Court's holding that

> "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."

Lanzetta v. *New Jersey*, 306 U. S. 451, 453.

In contravention of this Court's holdings in *Near* v. *Minnesota*, 283 U. S. 697, 708, *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, 237, *St. Louis S. W. Ry.* v. *Arkansas*, 235 U. S. 350, 352, *North Laramie Land Co.* v. *Hoffman*, 268 U. S. 276, 282, *Chicago, etc., R. Co.* v. *Chicago*, 166 U. S. 226, 234-235, such a decision would accord to form greater regard than to substance, and would ignore the practical operation and effect of the Court of Appeals' construction as applied and enforced in this case.

This Court could not completely perform its duty to enforce the constitutional guaranties of free press and due process if it considered itself bound by a legal fiction. In deciding a case such as this, this Court is not compelled to accept, without inquiry, the conclusion of the State Court.

Appleby v. *City of New York*, 271 U. S. 364, 380.

The principle established by a contrary decision would sustain convictions obtained in this manner under other *malum prohibitum* penal statutes, and affirmed in this manner by subsequent constructions in appellate courts, even though such statutes clearly and explicitly said one thing and the much later "construction" said something entirely

different. Such "constructions" could, and would act exactly like *ex post facto* legislative enactments. And yet, if the rule propounded by the appellee were to be enforced, this Court could do nothing about convictions obtained in this manner, despite the due process clause. This can not be. It must not be. The due process clause gives this Court the power and the duty to prevent it.

This Court, on previous occasions, has expressed itself on the point here involved.

In *Superior Water Co.* v. *Superior*, 263 U. S. 125, the facts were as follow:

In 1889, plaintiff's predecessor obtained certain contract rights from defendant's predecessor, under a municipal ordinance enacted by the latter.

In 1917, the latter, in pursuance of a law passed by the State legislature in 1911, took steps to deny its contractual obligation and to condemn the property involved.

The Supreme Court of Wisconsin, when the case came before it some time later, construed a reserved power clause of the Wisconsin Constitution, that had been in effect since 1848, and under which plaintiff's predecessor had been incorporated, as giving the legislature the power to modify the contract. It further held that the legislature, by the Act of 1911, had modified the contract in accordance with the provisions of that reserved power clause of the Wisconsin Constitution under which plaintiff's predecessor had been incorporated.

The case then came to this Court, which held that because of the contract clause of the Constitution, the construction given the reserved power clause by the State Court could not have a retroactive effect; that, in considering what the reserved power clause meant in 1889, when the contract rights were obtained, this Court was not bound by the

State Court's construction made thereafter. This Court said:

> "None of the decisions of the Supreme Court of Wisconsin prior to 1889 to which we have been referred construes the reservation in the State Constitution as having the extraordinary scope accorded to it below; and certainly in the absence of some clear and definite pronouncement we cannot accept the view that it then had the meaning now attributed to it"[28] (263 U. S., at p. 136).

In *Gelpcke* v. *City of Dubuque*, 68 U. S. (1 Wall.) 175, this Court held, at page 206:

> "However we may regard the late case in Iowa as affecting the future, it can have no effect upon the past. 'The sound and true rule is, that if the contract, when made, was valid by the laws of the State as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, or decision of its courts altering the construction of the law.'
>
> "The same principle applies where there is a change of judicial decision as to the constitutional power of the legislature to enact the law. To this rule, thus enlarged,

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28 At the time Winters was arrested and convicted, there was no decision of any kind in any court, construing subsection 2. All anybody could go on was the language of subsection 2 itself. Appellee, in charging a violation thereof by Winters, used the very language of the subsection, in the information filed by it (R. 4).

we adhere. It is the law of this court. It rests upon the plainest principles of justice."

and, at pages 206-207:

"We are not unmindful of the importance of uniformity in the decisions of this court, and those of the highest local courts, giving constructions to the laws and constitutions of their own States. It is the settled rule of this court in such cases, to follow the decisions of the State courts. But there have been heretofore, in the judicial history of this court, as doubtless there will be hereafter, many exceptional cases. We shall never immolate truth, justice, and the law, because a State tribunal has erected the altar and decreed the sacrifice.'

Although the applicability of the *Gelpcke* case has been limited, by subsequent decisions, to appeals from Federal Courts to this Court, and it has been held inapplicable to appeals from State Courts to this Court, this is so only because of a jurisdictional ground. The *Gelpcke* case involved the contract clause of the Constitution. That clause forbids only legislative impairment of contract obligations. It does not forbid impairment by judicial decision. Consequently, where a State Court, by "construction" of a state law, impairs a contractual obligation, there is no federal question for this Court to pass upon.

Bacon v. *Texas*, 163 U. S. 207, 221, 222.

That obstacle is not present in our case. The due process clause forbids action by all state agencies, including the judiciary (*Ex parte Virginia*, 100 U. S. 339). Therefore, the

principle enunciated in the *Gelpcke* case can, and should be applied to our case.

True, the *Superior* and *Gelpcke* cases were concerned with the contract clause, whereas our case involves the due process clause. But, the due process clause is no less important and worthy than the contract clause. The principle is the same, whichever constitutional right is impaired.

Appellee's statement, in note 2 on page 6 of its original brief in this Court:

> "For the purposes of determining its constitutionality, the statute must now be read as though the very words used in the opinion of the New York Court of Appeals had been written by the legislature itself."

correctly sets forth the rule to be followed in considering and answering this Court's first question. Appellant has followed this rule in answering that question, in Point I of this brief. But, that rule does not apply to this Court's third question, answered in this Point. None of the cases cited by appellee in support of that rule involved a situation such as is present here. In none of those cases was the due process clause involved. In none of those cases was the question raised, considered, or passed upon as to whether the construction by the State Court should be given a retroactive effect. Those cases merely held that this Court cannot review and revise a construction placed by the highest State court on a State statute as to a State matter. In only two of those cases, *Knights of Pythias* v. *Meyer*, 265 U. S. 30, 32, and *Minnesota* v. *Probate Court*, 309 U. S. 270, 273, was the statement made that this Court would take the statute as though it contained the lan-

guage used by the State court in construing it. That expression apparently was used by this Court for emphasis only, since there was no question there as to due process, or as to whether or not the construction was retroactive.

Those earlier decisions cited by appellee, based on conditions radically different from those present in the instant case, do not establish that Winters had due process. The problem is to be tested by what happened in his case (*United Rys. v. West*, 280 U. S. 234, 249). While the fundamental principles of the organic law of the Nation remain unchanged, their application to changing conditions must and does call for a restatement of earlier rules.

The rule contended for by appellee, general in form, and designed for a different purpose, should not be applied to this case, since to do so would result in depriving defendant of his right to defend himself on the ground on which the conviction is sought to be sustained.

Snyder v. *Massachusetts*, 291 U. S. 97, 114, 115;
Funk v. *United States*, 290 U. S. 371, 382, 383.

B

The statute, as enacted by the state legislature, and as applied to the defendant, violated the constitutional guaranty of a free press. The defendant's conviction thereunder was in violation of that guaranty.

This is discussed at length in appellant's original brief. To avoid repetition, this Court is respectfully referred to that brief.

In fact, I don't think there can be any doubt that the statute itself, read and understood as the legislature wrote it, is so broad, general, and all-inclusive with respect to the classifica-

tions it bans, that it effects an unconstitutional repression of the press.

Consider, in the light of the various "constructions" given this statute by the state courts, the plight of the defendant, or of any other person, whether he be a layman, a lawyer, or a judge, when faced with a statute such as this. Each state court "construed" the statute differently. There were three courts, and three different constructions. A person, confronted with such a statute before it is "construed" by any court, should have a right to act on the assumption that it means what it says. What it says is in direct violation of the constitutional guaranty of a free press. What it says shows that it is void, and so, need not, and should not be obeyed. It would not be a free press if a person, faced with such a statute, were compelled to bear the burden of speculation or conjecture as to a possible change of meaning by a subsequent "construction" by some court.

Lanzetta v. *New Jersey*, 306 U. S. 451, 453;
Connally v. *General Const. Co.*, 269 U. S. 385, 391, 392-393, 395;
Thomas v. *Collins*, 323 U. S. 516, 535.

C

There can be only one law, binding upon this Court, which governed the acts for which the conviction herein was had, whether it be the statute as the legislature actually wrote it, or Special Sessions' construction thereof, or the Appellate Division's construction, or the Court of Appeals' construction. The law, binding upon this Court, which governed the acts for which the conviction herein was had, cannot be construed one way in considering the question of due process,

and another way in considering the question of the freedom of the press.

The question is whether that controlling law is the statute (a) as the legislature actually wrote it, or (b) as the Court of Appeals construed it. (Special Sessions' construction[29] and the Appellate Division's construction[30] have been superseded by the Court of Appeals' construction.) Whichever that controlling law is, (a) or (b), the conviction herein, under such controlling law, as applied to Winters, was not compatible with the Fourteenth Amendment.

(a)

If the statute means what it says as the legislature wrote it—that it bans "criminal news" and "police reports" and "accounts of criminal deeds" and "pictures, or stories of deeds of bloodshed, lust or crime"[31]—then it is so broad, general, and all-inclusive as to effect an unconstitutional repression of the press, and the conviction thereunder is

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29 Special Sessions held that the statute is addressed to "lurid, crazy material," and that the test of criminal liability is "the manner in which—is treated and handled and set up in the magazine—the typography, and the language used to depict these crimes" (R. 24). Such a test is so vague and indefinite that it "blankets with uncertainty whatever may be said." A "sharp line cannot be drawn surely or securely. The effort to observe it could not be free speech, free press."

Thomas v. *Collins*, 323 U. S. 516, 535.

30 The Appellate Division's construction, that the statute is aimed at printed matter having a bad "tendency," renders the statute an unconstitutional attack upon the press.

Bridges v. *California*, 314 U. S. 252, 263, 273;
Thomas v. *Collins*, 323 U. S. 516, 530, 545;
Prof. Chafee, *Free Speech in the United States*, pp. 26-27, 35.

31 Since the statute enumerates these classes of writings in the disjunctive, each is banned by itself, regardless of the other classes listed.

void. This is considered at length in subdivision B of this Point, *supra*, and in appellant's original brief in this Court. To avoid repetition, this Court is respectfully referred thereto.

(b)

If it is the Court of Appeals' construction which is to be considered as governing the acts for which the conviction herein was had,[32] then that construction, as applied to this defendant, deprived him of due process. He was never charged with violating such a statute. He was never convicted of violating such a statute. He was deprived of any chance to defend himself under such a statute. The facts showing this have been set forth in detail in Point II of this brief. To avoid repetition, this Court is respectfully referred to that Point.

In addition, as has been shown in Point I of this brief, the statute as construed by the Court of Appeals violates the Fourteenth Amendment's guaranty of a free press, and consequently, the conviction thereunder is void.

In addition, the judgment of conviction against defendant was a general one (R. 30, 5). It did not specify the classification within the statute upon which it rested. As there are several distinct classifications set forth in the statute, and the trial court might have convicted with respect to any one of them, independently considered, it is impossible to say under which one the conviction was had. If any one of the classifications is unconstitutional,

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32 Appellant accepts, *pro arguendo* only, appellee's statement that the Court of Appeals held that the statute is "designed exclusively to outlaw 'vehicles for inciting violent and depraved crimes against the person' (R. 46)" (appellee's original brief in this Court, pp. 7-8).

the conviction cannot be upheld. Any other procedure would be sheer denial of due process.

Stromberg v. *California*, 283 U. S. 359, 364-365, 367-368;
Williams v. *North Carolina*, 317 U. S. 287.

The Court of Appeals construed only one of those classifications, *i.e.* "collections of pictures or stories of criminal deeds of bloodshed or lust" (R. 45). It did not construe those parts of the statute banning "criminal news" and "police reports." Nor did it go into the question of "whether the statute extends to accounts of criminal deeds not characterized by bloodshed or lust" (R. 46). The conviction herein by the Court of Special Sessions could very well have been made under one of these other classifications. There is no way of telling under which classification Special Sessions convicted defendant. Therefore, the application of the Court of Appeals' construction to this defendant is not compatible with the Fourteenth Amendment.

Stromberg v. *California*, 283 U. S. 359, 364-365, 367-368;
Williams v. *North Carolina*, 317 U. S. 287.

Furthermore, no court, not even the Court of Appeals, has ever held that the magazines herein are "vehicles for inciting violent and depraved crimes against the person." This has been shown in Point I of this brief, at pages 5 to 6.

Even if there had been such a finding, this Court is not compelled to accept it. This Court may examine the magazines and decide whether or not they have the effect necessary to sustain the conviction.

Fiske v. *Kansas*, 274 U. S. 380.

A brief description of the contents of the magazines is set forth at pages 10 to 11 of appellant's original brief in this Court, and shows that the magazines do not incite to crime. This is substantiated by a reading of the magazines themselves. Therefore, the conviction cannot be sustained even on that ground.

In concluding this brief, I wish to refer to the case of *Mutual Film Corp.* v. *Ohio Industrial Commissioners,* 236 U. S. 230, mentioned on a previous argument of this appeal. That case was decided in 1915. At that time, motion pictures were considered merely a form of entertainment, like vaudeville. That case approved a prior restraint, distinguishing motion pictures from the press. Prior restraints have been expressly condemned where the press is concerned (*Near* v. *Minnesota,* 283 U. S. 697). Between the time the *Mutual Film* case was decided, and now, the clear and present danger principle has been established (*Bridges* v. *California,* 314 U. S. 252; *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624; *Thomas* v. *Collins,* 323 U. S. 516), and the First Amendment's guaranty of a free press has been held to be protected by the Fourteenth Amendment from impairment by the States (*Douglas* v. *Jeanette,* 319 U. S. 157, 162). In addition, this Court has since then held that the right of free speech and free press is not confined to any field of human interest (*Thomas* v. *Collins,* 323 U. S. 516). It is doubtful whether the *Mutual Film* case would be followed to-day. Prof. Chafee in *Free Speech in the United States,* at page 544 and at pages 547 to 548, urges that the rule enunciated in the *Mutual Film* case should be changed.

CONCLUSION

The judgment of conviction should be reversed, and the information against appellant dismissed.

Respectfully submitted,

ARTHUR N. SEIFF,
Attorney for Appellant.

October 14, 1947.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 33

MURRAY WINTERS,

Appellant,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee

APPEAL FROM THE COURT OF SPECIAL SESSIONS OF THE CITY OF NEW YORK, STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

FRANK S. HOGAN,
District Attorney,
New York County.

INDEX

Subject Index

Table of Cases Cited

STATUTES CITED

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 636

MURRAY WINTERS,
Defendant-Appellant,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,
Appellee

MOTION TO DISMISS OR AFFIRM

MAY IT PLEASE THE COURT:

Now comes the appellee in the above-entitled cause, by their counsel of record, and moves that the appeal be dismissed, or in the alternative that the final judgment appealed from be affirmed.

Statement of the Case

The defendant-appellant was convicted in the Court of Special Sessions of the City of New York, on January 27, 1943, of the crime of POSSESSING WITH INTENT TO SELL MAGAZINES MADE UP OF ACCOUNTS OF DEEDS OF BLOODSHED, LUST OR CRIME (Penal Law, § 1141, subd. 2). The appellant was sentenced to pay a fine of $100 or to be imprisoned for 30 days. The appellant paid the fine and appealed to the

Appellate Division, First Department, which unanimously affirmed the judgment on May 19, 1944. On July 19, 1945, the Court of Appeals affirmed the conviction, Chief Judge Lehman dissenting. This appeal was allowed on September 10, 1945 by Chief Judge Lehman.

Summary of Facts

The defendant, a book dealer, was found in possession of a large number of magazines the contents of which were stories of criminal deeds of bloodshed, lust and crime embellished with pictures of fiendish and gruesome crimes, and lurid photographs of victims and perpetrators thereof. Featured articles bore such titles as "Bargains in Bodies," "Girl Slave to a Love Cult," and "Girls Reformatory." None of the contributors were suggested to be distinguished by their place in the literary world nor by the quality of their style. The magazines were found tied up in small bundles suitable for delivery to distributors, and there was proof of an admission by the defendant of his readiness to sell single copies indiscriminately.

New York Statute Involved

Section 1141, subdivision 2, of the Penal Law, provides, so far as pertinent, that any person who

> "Prints, utters, publishes, sells, lends, gives away, distributes or shows, or has in his possession with intent to sell, lend, give away, distribute or show or otherwise offers for sale, loan, gift or distribution, any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime; * * *
>
> * * * * * * * *
>
> "In guilty of a misdemeanor * * *."

Questions Presented

The appellant claims that the statute is repugnant to the Fourteenth Amendment of the Constitution of the United States, in that

1. it is vague and indefinite and

2. it abridges the freedom of the press.

The present motion by the appellee to dismiss, or in the alternative to affirm, is predicated upon the ground that these alleged constitutional questions are so unsubstantial as to be devoid of merit, to require no further argument, and to be specifically foreclosed by the decisions of this Court.

Opinions Below

In considering the constitutionality of this statute, the Appellate Division held that it

> "aimed exclusively at printed matter which presents tales of bloodshed, crime or lust in a manner that would have a tendency to demoralize its readers and would be likely to corrupt the morals of the young and lead them to immoral acts" (268 App. Div. 30, 32),

and concluded that, as so construed,

> "the statute challenged is valid, that its enactment is a legitimate exercise of the police power of the State * * *" (268 App. Div. at p. 34).

The Court of Appeals agreed with the Appellate Division as to the evils which the Legislature had sought to avoid in enacting the statute and found as a fact that the magazines which the appellant had in his possession fell within its ban. The Court overruled the appellant's claim that the criterion of indecency set forth in the statute was so vague and indefinite as to be unconstitutional, remarking that

> "a question as to whether a particular publication is indecent or obscene * * * is a question of the times which must be determined as a fact * * *" (294 N. Y. 545, 551).

Finally, the Court held that the facts of the present case brought it squarely within the limits of the State's police power as outlined by this Court in *Chaplinsky* v. *New Hampshire* (1941), 315 U. S. 568, 572, since the appellant's publications

> "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality" (294 N. Y. at p. 553).

I

The Statute Is Specific and Definite and as Applied to the Activity of the Appellant Is a Reasonable and Proper Exercise of the State's Police Power.

A. *The Statute is Specific and Definite*

The statute in question (Penal Law, § 1141, subd. 2) uses words of common and clear import to define the conduct penalized. There is nothing complex or abstruse either in the words or in the grammar employed. So far as it relates to the instant case, the law provides simply and clearly that any person who

> "has in his possession with intent to sell * * * any * * * magazine devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures or stories of deeds of bloodshed, lust or crime"

is guilty of a misdemeanor.

Reading this subdivision together with the general subject matter of which it is a part [*Southland Gasoline Co.* v.

Bailey (1943), 319 U. S. 44, 47], in order to arrive at the legislative purpose which prompted the enactment of the statute [*United States* v. *American Trucking Ass'n* (1939), 310 U. S. 534, 542-4], it becomes clear that the evil, which the statute sought to prevent, was the distribution of such publications as are "calculated to induce especially among the young, the immoralities they are thus incited to dwell upon, and so to endanger the public morals" [*State* v. *McKee* (1900), 73 Conn. 18, 26, 46 Atl. 409, 412].

The type of publication which is likely to bring about such a result has been so frequently considered by the courts as to supply an ascertainable standard of conduct. [See *Rosen* v. *United States* (1895), 161 U. S. 29, 43; *Magon* v. *United States* (1918), 248 Fed. 201, certiorari denied 249 U. S. 618; *Foy Prod. Ltd.* v. *Graves* (1938), 278 N. Y. 498; *People* v. *Muller* (1884), 96 N. Y. 408, 411; *People* v. *Berg* (2d Dept. 1934), 241 App. Div. 543, 544-5; *People* v. *Doris* (1st Dept. 1897), 14 App. Div. 117, 119; *People* v. *Seltzer* (Sup. Ct. N. Y. Co. 1924), 122 Misc. 329, 333, 335; *State* v. *McKee* (1900), 73 Conn. 18, 26, 46 Atl. 409, 412; *State* v. *Pioneer Press Co.* (1907), 100 Minn. 173, 110 N. W. 867, 868; *Williams* v. *State* (1923), 138 Minn. 827; *In re Banks* (1895), 56 Kans. 242, 42 Pac. 693, 694; *State* v. *Van Wye* (1896), 136 Mo. 227, 37 S. W. 938, 941; *Commonwealth* v. *Herald Pub. Co.* (1908), 128 Ky. 424, 108 S. W. 892, 895.]

It has long been established that a standard which can be no more precisely tested than by the experience of the community as to what the preservation of its morality requires is constitutionally valid. [*United States* v. *Rosen*, *supra*, 161 U. S. 29, 43; *United States* v. *Rebhun* (1940), 109 Fed. (2d) 512, 514, certiorari denied 310 U. S. 629; *Tyomies Pub. Co.* v. *United States* (1914), 211 Fed. 385, 388; *Coomer* v. *United States* (1914), 213 Fed. 1, 5; *Magon* v. *United States* (1918), 248 Fed. 201, certiorari denied 249 U. S. 618.]

Although there may be involved in the determination of criminality an element of degree as to which estimates may differ [see *Nash* v. *United States* (1913), 229 U. S. 373, 376-7], still, if the conduct penalized is "not beyond the ready comprehension either of persons affected by the act or of [those] called upon to determine violations" [*United States* v. *Ragen* (1942), 314 U. S. 513, 524], a statute will be held to be "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." [See *Kay* v. *United States* (1938), 303 U. S. 1, 9; *Connally* v. *General Construction Co.* (1926), 269 U. S. 385, 391.]

Appellant's suggestion, that the statute is so vague that treatises on crime, criminal law case books and mystery stories might conceivably fall within the purview of the statutory prohibition, proposes a conception too absurd to be considered as within the legislative intent. [See *Crooks* v. *Harrelson* (1930), 282 U. S. 55, 60,] The rule that defendants are not to be convicted under statutes too vague to apprize the citizen of the nature of his crime does not require distortion or nullification of the evident meaning and purpose of the legislation. [*United States* v. *Gaskin* (1944), 64 Sup. Ct. 318, 319.] Nor is such a possibility a corollary of the judgment convicting this defendant. If the statute be construed as going no farther than it is necessary to go in order to bring the defendant within it, there is no trouble with it for want of definiteness. [*Fox* v. *Washington* (1915), 236 U. S. 273, 277; see also *Robinson* v. *United States* (1945), — U. S. —, 65 S. Ct. 666, 668-9.]

The dissent of Chief Judge Lehman in the court below cites *Stromberg* v. *California* (1930), 283 U. S. 358 as authority for the proposition that the statute as construed by the New York Court of Appeals is so vague and indefinite as to permit punishment of the fair use of freedom of

speech. That case involved a prosecution under a statutory clause which was not only patently vague and was so recognized by the trial court, but which was furthermore highly susceptible of a construction which would strike at the very right of the people through the free exchange of ideas to secure a government representative of the will of the governed. The power of the community to protect itself from practices that are corrupting and dangerous to its morals was not involved.

The Indiana cases cited by Chief Judge Lehman rested on a requirement of Indiana law that crimes be defined and punishment therefor fixed by statute and not otherwise. [*Jennings* v. *State* (1861) 16 Ind. 335; *McJunkins* v. *State* (1858), 10 Ind. 140]. For that reason, the Indiana Court refused to sustain convictions for offenses never before held to be included within the definition of "public indecency" under a statute which merely prohibited "notorious lewdness or other public indecency," but which failed to enumerate the elements or acts which constituted the offense. The Legislature of the State of New York has in this case enumerated the elements and acts which constitute the crime of "Indecency" with great particularity [see New York Penal Law, Article 106; §§ 1140, 1140-a, 1140-b, 1141, 1141-a, 1142, 1142-a, 1143, 1145, 1146, 1148].

The statute in the case at bar presents no such difficulty. Section 1141 subdivision 1 deals with publications which have a tendency to corrupt the morals of the community by inciting to sexual misbehavior. [*People* v. *Eastman* (1907), 188 N. Y. 458; *Halsey* v. *New York Society for Suppression of Vice* (1922), 234 N. Y. 1; *People* v. *Muller* (1884), 96 N. Y. 405.] Reading subdivision 2 in the light of subdivision 1 as required by the canons of construction, the Court below (294 N. Y. at p. 550) recognized that it too seeks to protect the morals of the community by barring such pub-

lications as may "become vehicles for inciting violent and depraved crimes against the person."

B. *The Statute as Applied to the Appellant's Conduct Is Clearly Within the Police Power of the State*

At the outset, it may be observed that unless the statute is unconstitutional on its face, the petitioner is confined to attacking its validity *as applied to his activities as disclosed by the record.* He is not entitled to the benefit of any fanciful construction which might conceivably render the statute invalid. [*Fox* v. *Washington* (1915), 236 U. S. 273, 277; *Baender* v. *Barnett* (1921), 255 U. S. 224, 225-226; *United States* v. *Kirby* (1868), 74 U. S. 482, 486.] As was observed in *Fox* v. *Washington, supra,* 236 U. S. 273, 277:

> "So far as statutes fairly may be construed in such a way as to avoid doubtful constitutional questions, they should be so construed; * * * and it is to be presumed that state laws will be construed in that way by the state courts."

Under the rule thus enunciated, there can be no conceivable doubt of the validity of the statute. As appears from the summary of facts (*supra,* p. 2), the publications in appellant's possession were clearly composed of "pictures and stories of deeds of bloodshed, lust or crime" which, to quote the court below (294 N. Y. at p. 551):

> "plainly carried an appeal to that portion of the public who (as many recent records remind us) are disposed to take to vice for its own sake."

Since, as we have shown, subdivision 2 of Section 1141 of the New York Penal Law aims exclusively at printed matter which presents stories of crime in a manner calculated to impair public morals and to induce crime, its validity is unquestionable. The constitutional guarantee of

freedom of the press provides no immunity from punishment to those who publish matter inimical to the public welfare and dangerous to public morals.

See *Near* v. *Minnesota* (1931), 283 U. S. 697, 714;
Gitlow v. *People of New York* (1924), 268 U. S. 652, 666-7;
Gilbert v. *Minnesota* (1920), 254 U. S. 325, 332;
Schaeffer v. *United States* (1920), 251 U. S. 466, 474;
Rebhun v. *Cahill* (1939), 31 Fed. Sup. 47, 49;
Tyomies Publishing Co. v. *United States* (1914), 211 Fed. 385;
Knowles v. *United States* (1903), 170 Fed. 409, 411-12.

Thus, this Court said in the *Gitlow* case, *supra,* 268 U. S. at pp. 666-667:

> "That a state in the exercise of its police power may punish those who abuse this fredom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question."

And again in *Chaplinsky* v. *New Hampshire* (1941), 315 U. S. 568, 571-572:

> "Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise a constitutional problem. These include the lewd and obsence, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them

is clearly outweighed by the social interest in order and morality."

The Court below held that the matter contained in the magazines which the appellant sought to sell falls squarely within the zone of permissible state action, as outlined in the foregoing decisions of this Court. This ruling, we submit, should not be disturbed.

Conclusion

It is apparent, therefore, that the Federal question which the appellant seeks to bring to the consideration of this Court is wholly unsubstantial and one which has already been foreclosed by the previous decisions of this Court. The appellee, consequently, respectfully requests that the appeal be dismissed or, in the alternative, that the judgment appealed from be affirmed.

Respectfuly submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 86 33

MURRAY WINTERS,
Appellant,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Appellee.

APPELLEE'S BRIEF

FRANK S. HOGAN,
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INDEX

Table of Cases Cited

Statutes Cited

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

MURRAY WINTERS,
Appellant,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Appellee.

APPELLEE'S BRIEF

This is an appeal pursuant to section 237(a) of the Judicial Code (28 U. S. C. A. § 344) and 45 Stat. 54 (28 U. S. C. A. § 861a) from a final judgment of the Court of Special Sessions of the City of New York (R. 49), entered upon an order of the Court of Appeals (R. 42-3) affirming (LEHMAN, Ch. J., dissenting) (R. 49) an order of the Appellate Division of the Supreme Court (R. 36-7) unanimously affirming a judgment of the Court of Special Sessions convicting the appellant of the crime of POSSESSING WITH INTENT TO SELL PRINTED PAPER DEVOTED TO ACCOUNTS OF DEEDS OF BLOODSHED, LUST OR CRIME (Penal Law, § 1141, subd. 2). The appeal was allowed by the Chief Judge of the Court of Appeals (R. 52-3).

Both appellate courts below rendered opinions which are officially reported *sub nom. People* v. *Winters*, 268 App. Div. 30; aff'd 294 N. Y. 545 (R. 37-41, 44-8).

Introduction

The appellant has been convicted of possessing, with intent to sell, some two thousand copies of magazines composed entirely of articles described by the appellate courts below as being "embellished with pictures of fiendish and gruesome crimes, * * * besprinkled with lurid photographs of victims and perpetrators" and having "such titles as 'Bargains in Bodies,' 'Girl Slave to a Love Cult,' and 'Girls' Reformatory' " (R. 38, 46). These magazines, the New York Court of Appeals further observed, "plainly carried an appeal to that portion of the public who (as many recent records remind us) are disposed to take to vice for its own sake" (R. 46).

The defendant has at no time claimed any literary or other merit for the publications thus described. Nor did he contend in any state court that his constitutional rights have been violated by the manner in which the statute was applied thereto. His sole contention has been—and substantially still is—that the law under which he was convicted (Penal Law, § 1141, subd. 2) is unconstitutional on its face and that, accordingly, no conceivable set of facts could justify a conviction thereunder.[1]

---

[1] The appellant thus posed the issue in his brief to the New York Court of Appeals (p. 8):

> "That the magazines, for the possession of which the appellant has been convicted, come within the provisions of subdivision 2 of Section 1141 of the Penal Law is not disputed. * * *
>
> "The determinative factor is not the publications involved in this case, or the facts of this case. It is whether subdivision 2 is valid or invalid. If it is invalid, no conviction under it can stand."

Similarly, in the trial court, the appellant based his motion to dismiss the information **solely** on the ground that the statute was invalid on its face; he made no contention that any constitutional or other question was raised by the application of the statute to the magazines before the court (R. 22-4; see, also, R. 29-30).

The New York Statute Involved

The statute under which the appellant was convicted is part of Article 106 of the Penal Law which deals generally with "indecency," and, so far as here relevant, provides:

> **"§ 1141. Obscene prints and articles.**
>
> "1. A person who * * *; or who,
>
> "2. Prints, utters, publishes, sells, leads, gives away, distributes or shows, or has in his possession with intent to sell, lend, give away, distribute or show, or otherwise offers for sale, loan, gift or distribution, any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime; or who,
>
> "3. * * *
>
> "Is guilty of a misdemeanor * * *."

The omitted portion of subdivision 1 deals exclusively with such forms of obscenity and indecency as have relation to sexual impurity [see Opinion of Court of Appeals herein (R. 45); *People* v. *Eastman* (1907) 188 N. Y. 478]. The third subdivision, likewise omitted from the above quotation, has no bearing upon this appeal.

Construction Placed Upon the Statute by the New York Courts

Each of the three New York courts called upon to pass upon the appellant's guilt expressed an opinion as to the meaning of the statute here involved.

The Court of Special Sessions of the City of New York

The question of construction was first placed before the trial court when the appellant moved, at the close of the People's evidence, to dismiss the information on the ground that the statute was "clearly unconstitutional," in that "if you follow the letter of the law, a case-book used in law school in criminal law, which is a book composed primarily of crime or stories of crime or articles concerning crime, would be banned" (R. 23), and "even Horatio Alger" and "the average detective story" would be prohibited (R. 24).

The court rejected this sweeping interpretation and, speaking through Mr. Justice Cooper, announced its opinion that it was not the subject matter of the appellant's magazine, but the "manner" in which the stories were "treated and handled" and the "typography, and the language used to depict these crimes" which brought them within the condemnation of the law (R. 24).

The Appellate Division of the New York Supreme Court

The Appellate Division ruled that the statute in no way interfered with publications "dealing with crime news as an incident to the legitimate purposes of science or literature" and that it did not seek to suppress "a large class of recognized literature including practically all detectives and western stories and books" but was (R. 39):

> "aimed exclusively at printed matter which presents tales of bloodshed, crime or lust in a manner that would have a tendency to demoralize its readers and would be likely to corrupt the morals of the young and lead them to immoral acts."

The Court of Appeals

The Court of Appeals re-emphasized the rulings of the courts below that it was the "manner of treatment" rather than the subject matter of the appellant's magazines which brought them under condemnation, and that the statute was not intended to interfere with any legitimate publication. Thus, in considering the appellant's contention that the statute was so broad as to condemn "any publication devoted to and principally made up of criminal news or police reports or accounts of criminal deeds regardless of the manner of treatment," the court, speaking through its present Chief Judge, observed (R. 45):

> "This conception—which would outlaw all commentaries on crime from detective tales to scientific treatises—may, we think, be dismissed at once on the short ground that its manifest injustice and absurdity were never intended by the Legislature."

Applying the doctrine that a legislative enactment must be read "in accordance with the general subject matter of which it is a part," the court then construed the statute as outlawing only "indecent or obscene" publications (R. 45). It ruled, however, that the terms *indecency* and *obscenity* should not be limited to "that form of immorality which has relation to sexual impurity" (*id.*). Thus, the court declared (R. 46):

> "Collections of pictures or stories of criminal deeds of bloodshed or lust unquestionably can be so massed as to become vehicles for inciting violent and depraved crimes against the person and in that case such publications are indecent or obscene in an admissible sense, though not necesarily in the sense of being calculated or intended to excite sexual passion. This idea, as it seems to us, was the principal reason for the enactment of the statute."

POINT I

As construed by the New York Court of Appeals the statute under attack does not conflict with the Fourteenth Amendment.

The appellant's entire attack on the statute appears to be based on the assumption that it outlaws "the publication of 'criminal news' alone, or 'police reports' alone, as well as 'accounts of criminal deeds,' * * * whether consisting of truth or statistics, as well as fiction" (brief, pp. 15-16). This argument ignores the circumstance that the New York Court of Appeals has specifically rejected such construction "on the short ground that its manifest injustice and absurdity were never intended by the Legislature" (R. 45), and has limited the statute to indecent or obscene collections of crime stories whose lurid details are "so massed as to become vehicles for inciting violent and depraved crimes against the person" (R. 46). So interpreted—as it must now be[2]—the statute presents no constitutional difficulty of any sort.

---

[2] For the purposes of determining its constitutionality, the statute must now be read as though the very words used in the opinion of the New York Court of Appeals had been written by the legislature itself [*Smiley* v. *Kansas*, 196 U. S. 447, 455; *Gatewood* v. *North Carolina*, 203 U. S. 531, 541; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 73; *Quong Ham Wah Co.* v. *Industrial Commission*, 255 U. S. 445, 449; *Pierce Oil Corp.* v. *Hopkins*, 264 U. S. 137, 139; *Schuylkill Trust Co.* v. *Pennsylvania*, 302 U. S. 506, 512; *Minnesota* v. *Probate Court*, 309 U. S. 270, 273; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572-3]. This doctrine has been "so frequently and uniformly" enunciated as to make it "axiomatic" [*Knights of Pythias* v. *Meyer*, 265 U. S. 30, 32].

1. No question of the freedom of the press is presented.

It is patent that neither the principle of freedom of the press nor any other constitutional guarantee was intended to sanction publications designed to incite to criminal or immoral conduct. Indeed, this Court has repeatedly declared that statutes seeking the suppression of such utterances are not subject to attack on constitutional grounds (*Fox* v. *Washington*, 236 U. S. 273, 277; *Gitlow* v. *New York*, 268 U. S. 652, 667; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571-2; see, also, *Rosen* v. *United States*, 161 U. S. 29, 43; *Near* v. *Minnesota*, 283 U. S. 697, 716; *United States* v. *Limehouse*, 285 U. S. 424; *DeJonge* v. *Oregon*, 299 U. S. 353, 364.

In *Chaplinsky* v. *New Hampshire*, *supra*, 315 U. S. 568, 571-2, this Court, speaking through Mr. Justice MURPHY, ruled:

> "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene * * *."

Similarly, in *DeJonge* v. *Oregon*, *supra*, 299 U. S. 353, 364, the Court, per Mr. Chief Justice HUGHES, observed:

> "These rights [freedom of speech and of the press] may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse."

None of the cases cited by the appellant is contrary to the foregoing doctrine, or in any way supports his present position. None of them deals with a statute designed exclusively to outlaw "vehicles for inciting violent and de-

praved crimes against the person" (R. 46). On the contrary, each deals with a situation where a state has—through the medium of a municipal ordinance or otherwise—sought directly to interfere with the practice of religion, or with the free expression of ideas on political or economic matters. Thus, six of the cases cited by the appellant involved freedom of religion (*Schneider* v. *State*, 308 U. S. 147; *Chaplinsky* v. *New Hampshire*, *supra*, 315 U. S. 568; *Murdock* v. *Pennsylvania*, 319 U. S. 105; *Martin* v. *Struthers*, 319 U. S. 141; *Douglas* v. *Jeannette*, 319 U. S. 157; *Board of Education* v. *Barnette*, 319 U. S. 624); three dealt with attempts to circumscribe the activities of labor unions or their agents (*Thornhill* v. *Alabama*, 310 U. S. 88; *American Federation of Labor* v. *Swing*, 312 U. S. 321; *Thomas* v. *Collins*, 323 U. S. 516); one was concerned with a state's attempt to suppress an unpopular political ideology (*Herndon* v. *Lowry*, 301 U. S. 242); one involved a state statute authorizing injunctions against newspaper editors who charged public officials with laxity and corruption (*Near* v. *Minnesota*, *supra*, 283 U. S. 697); and one struck down the attempt of a state court to foreclose public discussion of litigation pending before it (*Bridges* v. *California*, 314 U. S. 252).

The statute at bar, on the other hand, does not even remotely deal with the dissemination of ideas, and has no tendency whatever to "restrain orderly discussion and persuasion" (*cf. Thomas* v. *Collins*, *supra*, 323 U. S. 516, 530).

2. The statute is neither vague nor indefinite.

The appellant argues that because any conviction under the statute must necessarily rest upon a factual determination as to the obscenity of a given publication, it follows that "Different juries or different judges might • • •

render different rulings with respect to the same book" (brief, p. 17) and, consequently, that the statute is too vague to be enforceable. Such contentions have long since been foreclosed by decisions of this Court (*Rosen* v. *United States, supra,* 161 U. S. 29; *Nash* v. *United States,* 229 U. S. 373, 376-7; *Fox* v. *Washington, supra,* 236 U. S. 273; *Hygrade Provision Co.* v. *Sherman,* 266 U. S. 497, 502; *United States* v. *Ragen,* 314 U. S. 513, 523; *Chaplinsky* v. *New Hampshire, supra,* 315 U. S. 568, 574).

In *Nash* v. *United States, supra,* 229 U. S. 373, the Court had before it a contention that the Federal Anti-Trust Act was insufficiently precise to be enforceable. Speaking through Mr. Justice HOLMES, the Court rejected that argument, pointing out (at p. 377):

> "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death."

In *Hygrade Provision Co.* v. *Sherman, supra,* 266 U. S. 497, the Court, referring to Mr. Justice HOLMES' above-quoted dictum, observed (at p. 502):

> "Many illustrations will readily occur to the mind, as for example * * * statutes prohibiting the transmission through the mail of obscene literature, * * * which have [not] been found to be fatally indefinite because in some instances opinions differ in respect of what falls within their terms."

In *Fox* v. *Washington, supra,* 236 U. S. 273, the doctrine of the *Nash* case was applied to facts analogous to those at bar. There, the plaintiff in error had been convicted under a statute making it unlawful to publish any printed matter

which, among other things, tended "to encourage or advocate disrespect for law or for any court or courts of justice" (p. 275). His particular offense had been the publication of an article entitled "The Nude and the Prudes," which was found to have a tendency toward encouraging and inciting persons to indulge in nude bathing in violation of the state laws against indecent exposure. In sustaining the statute and the conviction thereunder, this Court, speaking through Mr. Justice HOLMES, ruled (at p. 277):

> "We understand the state court by implication at least to have read the statute as confined to [writings] encouraging an actual breach of law. Therefore the argument that this act is both an injustifiable restriction of liberty and too vague for a criminal law must fail."

The present statute, as construed by the state court, is of much narrower scope than the one upheld in the *Fox* case. Its effect has been limited, not only to such publications as encourage crime in general but, specifically, to such as incite "violent and depraved crimes against the person" (R. 46).

Connally v. *General Construction Company*, 269 U. S. 385, *Stromberg* v. *California*, 283 U. S. 359, and *Williams* v. *North Carolina*, 317 U. S. 287, the three decisions of this Court upon which the appellant relies (brief, pp. 15, 18), have no application to the situation at bar.

In the *Connally* case, a statute making it criminal to pay a laborer "less than the current rate of per diem wages in the locality where the work is performed" was declared invalid on the ground that neither the law itself nor any recognized canon of construction provided a definition for

the term "current rate of • • • wages" or gave any indication as to how much territory was to be included in the phrase "locality where the work is performed" (269 U. S., at p. 393). As illustrated by *Fox* v. *Washington, supra,* 236 U. S. 273, and the other cases above cited, no such difficulty adheres in a statute like the one at bar.

In the *Stromberg* case, the defendant had been prosecuted under a statute containing three separate provisions, one of which was conceded to be unconstitutional, and the trial judge had explicitly charged the jury that they might find the defendant guilty on the unconstitutional part of the law without considering any of its other provisions (283 U. S., at pp. 363-4, 368). A similar situation was presented in *Williams* v. *North Carolina* (317 U. S., at pp. 291-2). Here, on the other hand, the theory of prosecution has been consistent throughout (see, *supra,* pp. 4-5).

Conclusion

The instant appeal aptly illustrates the observation recently made by the Chief Justice in *Alabama State Federation of Labor* v. *McAdory,* 325 U. S. 450, 470:

> "State courts • • • may, and often do, construe state statutes so that in their application they are not open to constitutional objections which might otherwise be addressed to them."

The New York Court of Appeals having adopted the course outlined in the above quotation, no constitutional question survives. It follows that the appeal should be dismissed for want of a substantial federal question (*Quong Ham Wah Co.* v. *Industrial Comm.,* 255 U. S. 445, 449).

The appeal should be dismissed or, in the alternative, the judgment appealed from should be affirmed.

Respectfully submitted,

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March 1946.

Supreme Court of the United States

October Term, 1947

No. 3

MURRAY WINTERS,

Appellant,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

APPELLEE'S BRIEF ON REARGUMENT

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SUBJECT INDEX

Table of Cases

Statutes Cited

V

Other Material

Supreme Court of the United States

October Term, 1947

No. 3

MURRAY WINTERS,

Appellant,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

APPELLEE'S BRIEF ON REARGUMENT

Preliminary Statement

This is the second reargument, directed by an order restoring the case to the docket and instructing the filing of new briefs on three specific questions [91 Law Ed. (adv.) 1605; 67 Sup. Ct. 1747, *infra*, p. 3], of an appeal from a final judgment of the Court of Special Sessions of the City of New York [R. 49; Judicial Code, §237(a) (28 U. S. C. A., §344); 45 Stat. 54 (28 U. S. C. A., §861a)]. That judgment was entered upon an order of the Court of Appeals affirming (R. 42-3, 44-8; LEHMAN, Ch. J., dissenting at R. 48-9; 294 N. Y. 545, 553) an order of the Appellate Division of the Supreme Court (R. 36-7, 37-41; 268 App. Div. 30) unanimously affirming the original judgment of the Court of Special Sessions convicting defendant of the crime of POSSESSING WITH INTENT TO SELL MAGAZINES DEVOTED TO ACCOUNTS OF DEEDS OF BLOODSHED, LUST AND CRIME (Penal Law, §1141, subd. 2). This appeal was allowed by the Chief Judge of the Court of Appeals (R. 52-3).

Introduction

Appellant was convicted of possessing with intent to sell some two thousand copies of a lurid magazine entitled "Headquarters Detective—True Cases from the Police Blotter," which plainly violated a New York indecency and obscenity-type statute outlawing publications principally devoted to tales of "bloodshed, lust or crime" (exhibits 4, 5; Penal Law, §1141, subd. 2).

On appeal, the first under the statute, the Court of Appeals construed it to apply to a narrowly-limited class of such printed matter which tends to incite to violent and depraved crimes against the person, and which neither has a legitimate relation to news, literature or science, nor constitutes any essential part of that exposition of ideas understood to be protected by the guarantee of a free press (see The Statute—As Construed, *infra*, pp. 5-6).

It is our position that the instant magazines are incapable of being identified with any constitutionally protected form of expression, that the statute as construed is incapable of interfering with any such expression, and that no other substantial constitutional question is presented.

The Questions Asked by the Court

In accordance with the order directing reargument, the three questions asked by the Court will be answered as follows:

Question 1: "Is subsection 2 of Section 1141 of the New York Penal Code, as construed by the Court of Appeals, compatible with the Fourteenth Amendment?"

Answer: Point I. The statute is constitutional as construed.

a. It cannot interfere with freedom of the press and the test of "clear and present danger" is therefore inapplicable (*infra*, pp. 7-8).

b. It is a valid exercise of the regulatory power (*infra*, pp. 9-10).

Question 2: "In view of such construction, assuming the answer to the first question is in the affirmative, was the conviction herein compatible with the Fourteenth Amendment, considering the state of the law to have been what it was at the time that the acts were committed for which the conviction was had?"

Answer: Point II. Appellant's conviction is constitutional in that the statute as it read at the time of the offense gave fair warning and furnished an adequate standard of guilt (*infra*, pp. 11-13).

Question 3: "In view of the construction herein given by the Court of Appeals to subsection 2 of Section 1141 of the New York Penal Code, what was the law, binding upon this Court, which governed the acts for which the conviction herein was had? Was the conviction under such controlling law, as applied to this defendant at that time, compatible with the Fourteenth Amendment?"

Answer: Point III. The law binding upon this Court is that declared by the Court of Appeals; the application of such controlling law to appellant as of the time of his offense presents no question under the Fourteenth Amendment (*infra*, pp. 13-16).

The Magazines

The Court of Appeals found that the magazines in this case "plainly carried an appeal to that portion of the public" who are "disposed to take to vice for its own sake" (R. 46). They were filled with tales of vice, murder and intrigue "embellished with pictures of fiendish and gruesome crimes * * * besprinkled with lurid photographs of victims and perpetrators," bearing such titles as "Bargains in Bodies," "Girl Slave to a Love Cult" and "Girls' Reformatory." They clearly tended to incite to "violent and depraved crimes against the person" (R. 46; see R. 38; exhibits 4, 5; Appendix A, *infra*, pp. 17-21).

Aside from the portrayal of such lurid descriptions of bloodshed and lust, the magazines manifest no other discernible theme or purpose. Appellant has admitted that they are in themselves of "no great importance" (see appellant's original brief, p. 11).[1] At no time below did he claim either that they dealt with any legitimate end of news, literature or science, or that they constituted any essential part of that exposition of ideas protected by the constitutional guarantee of a free press (*cf.* Appendix A, *infra*, pp. 17-21).

[1] We shall hereafter refer to the brief which appellant filed at the time of the first argument as his "original brief," and to the one submitted in answer to the Court's questions as his "brief on reargument."

The Statute

a. As Enacted

Article 106 of the New York Penal Law forbids enumerated forms of criminal "Indecency." Section 1141 in that indecency article bans the distribution of "Obscene prints." The first subdivision of that obscenity section deals exclusively with sexual immorality. The second, under which appellant was convicted, is directed against other forms of immorality and provides that any person shall be guilty of a misdemeanor who (Penal Law, §1141, subd. 2):

> "Prints, utters, publishes, sells, lends, gives away, distributes or shows, or has in his possession with intent to sell, lend, give away, distribute or show, or otherwise offers for sale, loan, gift or distribution, any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime; * * *."

b. As Construed

The Court of Appeals construed this statute in harmony with its context, accepted canons of construction, and the opinion in *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (R. 45-6, 48). Applying recognized doctrines of indecency and obscenity law to the text before it, the court ruled that pictures and stories of criminal deeds of bloodshed and lust were indecent and obscene in an admissible sense only when so massed as to tend to incite to "violent and depraved crimes against the person" (R. 46; *cf. Magon* v. *United States* (C. C. A. 9th 1918), 248 Fed. 201, 202-203, cert. den. 249 U. S. 618).

Emphasizing the narrow scope of the statute, the court made clear that it interfered with no legitimate end of news, literature or science, and rejected as manifestly absurd the contention that the statute might be used to outlaw "truth, fiction and statistics," "news," "police reports," "commentaries" or "scientific treatises" dealing with crime (R. 45).

In accord with previously announced New York doctrine confining indecency and obscenity legislation to matters not protected by constitutional guarantees of free expression [*cf. People* v. *Eastman* (1907) 188 N. Y. 478, 481-482], the court identified the matter outlawed by the instant statute with those utterances whose suppression has "never been thought to raise a constitutional problem" because they form no "essential part of any exposition of ideas" (R. 48; see *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571-572).

Appellant has suggested no situation in which the statute, thus construed by the Court of Appeals, could be unconstitutionally applied.

POINT I.

The statute is constitutional as construed [answering question 1].

A. The statute cannot interfere with freedom of the press, and the test of "clear and present danger" is without application.

This is apparently the first State indecency or obscenity statute to be reviewed by this Court. As the Court of Appeals recognized, it falls within that well-accepted category of legislation which, having its own carefully-fashioned tests, has never been held to be forbidden by the guarantee of a free press nor subjected to the overriding test of "clear and present danger" [*cf. Robertson* v. *Baldwin*, 165 U. S. 275, 281; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571-572; *Tyomies Publishing Co.* v. *United States* (C. C. A. 6th 1914) 211 Fed. 385, 388; *United States* v. *Harmon* (D. Kans. 1891) 45 Fed. 414, 415-416, rev'd on other grounds 50 Fed. 921; *United States* v. *Journal Co.* (E. D. Va. 1912) 197 Fed. 415, 418; *Rebhuhn* v. *Cahill* (S. D. N. Y. 1939) 31 Fed. Supp. 47, 49; *In re Banks* (1895) 56 Kan. 242, 243-244, 42 Pac. 693, 694; *Williams* v. *State* (1923) 130 Miss. 827, 841-842, 94 So. 882, 883; *State* v. *Van Wye* (1896) 136 Mo. 227, 233-236, 37 S. W. 938, 939-940; 2 Cooley's *Constitutional Limitations* (8th ed. 1927) pp. 886, 1328].

Moreover, even assuming that this were not an indecency or obscenity statute, it has been so limited by the Court of Appeals that, as construed, it excludes from its scope of operation all writings purporting to champion or discuss ideas on matters of public importance, and therefore can in no possible way interfere with any essential part of exposition of ideas protected by freedom of the

press and by the test of "clear and present danger" (see The Statute—As Construed, *supra*, pp. 5-6; R. 45-8; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571-572; *cf. Mutual Film Corp.* v. *Ohio Industrial Comm.*, 236 U. S. 230; see, also, *Whitney* v. *California*, 274 U. S. 357, 375-378 (Mr. Justice BRANDEIS concurring); *Near* v. *Minnesota*, 283 U. S. 697, 717-718; *Grosjean* v. *American Press Co.*, 297 U. S. 233, 245-250; *Lovell* v. *Griffin*, 303 U. S. 444, 452; *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152-153n; *Thornhill* v. *Alabama*, 310 U. S. 88, 95, 101-102; *Thomas* v. *Collins*, 323 U. S. 516, 544-546 (Mr. Justice JACKSON concurring).

The cases cited by appellant (original brief, pp. 7, 11, 13-14, 16, 17, 21-23; brief on reargument, pp. 7, 9, 12-13, 15, 17, 24, 36, 45-46) are not in point. None involved statutes of this recognized indecency and obscenity type. All dealt with political, economic or religious utterances clearly forming an essential part of the constitutionally protected exposition of ideas, the repression of which is impossible under this statute as construed. [POLITICAL: *Near* v. *Minnesota*, 283 U. S. 697; *Herndon* v. *Lowry*, 301 U. S. 242. POLITICO-ECONOMIC: *Fiske* v. *Kansas*, 274 U. S. 380; *Hague* v. *C. I. O.*, 307 U. S. 496; *Thornhill* v. *Alabama*, 310 U. S. 88; *A. F. L.* v. *Swing*, 312 U. S. 321; *Bridges* v. *California*, 314 U. S. 252. RELIGIOUS: *Schneider* v. *State*, 308 U. S. 147; *Murdock* v. *Pennsylvania*, 319 U. S. 105; *Martin* v. *Struthers*, 319 U. S. 141; *Douglas* v. *Jeannette*, 319 U. S. 157; *Board of Education* v. *Barnette*, 319 U. S. 624. *Cf. Palko* v. *Connecticut*, 302 U. S. 319, 327; *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152-153; *Ex parte McCormick* (1935) 129 Tex. Crim. Rep. 457, 88 S. W. (2d) 104].

In brief, the statute as construed cannot interfere with any publications protected by freedom of the press, and the test of "clear and present danger" is therefore inapplicable.

B. The statute is a valid exercise of the regulatory power.

All questions of interference with freedom of the press and, consequently, of the application of the "clear and present danger" doctrine having been eliminated, it only remains to determine whether the statute as construed has reasonable relation to a proper legislative purpose (compare *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152-153n with *Nebbia* v. *New York*, 291 U. S. 502, 537).

There can be no doubt of the propriety of a legislative purpose to protect morals and prevent crime [*cf. Fox* v. *Washington*, 236 U. S. 273, 277; *Gitlow* v. *New York*, 268 U. S. 652, 666-671; *Near* v. *Minnesota*, 283 U. S. 697, 716; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568; *State* v. *McKee* (1900) 73 Conn. 18, 26, 46 Atl. 409, 412 (identical statute), cited in *Gitlow* v. *New York*, 268 U. S. 652, 667].

There is adequate basis for the legislative judgment that forms of criminal suggestion have an appreciable effect upon delinquency and crime and, accordingly, that suppression of the narrowly limited class of printed matter against which this statute is directed bears reasonable relation to that legislative purpose [*cf. State* v. *McKee* (1900) 73 Conn. 18, 46 Atl. 409 (identical statute), cited in *Gitlow* v. *New York*, 268 U. S. 652, 667; *Strohm* v. *People* (1896) 160 Ill. 582, 43 N. E. 622; see, also, Blumer and Hauser, *Movies, Delinquency and Crime* (1933) pp. 9, fn. 9; 11-112; 198-200; commented on in 22 Survey Graphic (May 1933) pp. 245-250; 115 Literary Digest (May 13, 1933) p. 16; 8 Parents' Magazine (Aug. 1933) pp. 18-19; Taft, *Criminology* (1942) pp. 199-206; Thrasher, *The Gang* (2nd ed. 1936) pp. 106-113; Healy, *The Individual Delinquent* (1915) pp. 304-306, see pp. 339-341; Beckham, *Over-*

Suggestibility in Juvenile Delinquency, 28 Journal of Abnormal and Social Psychology (July-Sept. 1933) pp. 172-178; Cochran, *Movies and Young Criminals*, 21 National Education Association Journal (May 1932) p. 169; Preston, *Children's Reactions to Movie Horrors and Radio Crime*, 19 Journal of Pediatrics (Aug. 1941) pp. 147-168; *The Juvenile Delinquency Problem* (Federal Bureau of Investigation, U. S. Dept. of Justice, Memorandum, April 8, 1946) p. 5, no. 16; Cooper, *This Trash Must Go!* 103 Forum (February 1940) pp. 61-64].

Finally, the statute as construed is directed exclusively against publications of such "slight social value as a step to truth" that any benefit that might be derived from their distribution is "clearly outweighed by the social interest in order and morality." It is, therefore, a valid exercise of the regulatory power (*Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572).

In summary: As construed, the statute cannot interfere with any publication coming within the protection of the constitutional guarantee of free discussion, and the test of "clear and present danger" is therefore without application. It was properly enacted in furtherance of a valid legislative purpose. The statute as construed is, therefore, compatible with the Fourteenth Amendment.

POINT II

Appellant's conviction is constitutional in that the statute as it read at the time of the offense gave fair warning and furnished an adequate standard of guilt [answering question 2].

We here assume that the publications involved can make no claim to constitutional protection; that the statute is constitutional as construed in that, enacted pursuant to a legitimate legislative purpose, it cannot interfere with publications protected by freedom of the press; and, accordingly, that the test of "clear and present danger" is inapplicable (see The Magazines; Point I, *supra*, pp. 4, 7-10).

The statute gave fair notice of its ultimate effect in that it was readily recognizable as falling within a previously established body of law dealing with indecency and obscenity [see *State* v. *McKee* (1900) 73 Conn. 18, 46 Atl. 409 (identical statute), cited in *Gitlow* v. *New York*, 268 U. S. 652, 667; *Strohm* v. *People* (1896) 160 Ill. 582, 43 N. E. 622].

Like all others of its type, this statute ultimately depends for its application on the community's standard of morality, long recognized as furnishing an adequate standard of guilt [*cf. Rosen* v. *United States*, 161 U. S. 29, 41-42; *Tyomies Publishing Co.* v. *United States* (C. C. A. 6th 1914) 211 Fed. 385, 388; *Coomer* v. *United States* (C. C. A. 8th 1914) 213 Fed. 1, 5-6; *Magon* v. *United States* (C. C. A. 9th 1918) 248 Fed. 201, 202-203, cert. den. 249 U. S. 618; *United States* v. *Levine* (C. C. A. 2nd 1936) 83 Fed. (2d) 156, 157; *United States* v. *Rebhuhn* (C. C. A. 2nd 1940) 109 Fed. (2d) 512, 514, cert. den. 310 U. S. 629;

also Cardozo, *The Paradoxes of Legal Science* (1928) pp. 36-37].

The mere fact that this particular indecency and obscenity statute presents a variant of common law forms, and deals partially with matters other than sexual immorality, does not prevent such application of community morality as a standard of guilt [*cf. United States* v. *Limehouse*, 285 U. S. 424, 426; *Magon* v. *United States* (C. C. A. 9th 1918) 248 Fed. 201, cert. den. 249 U. S. 618; 36 Stat. 1339 (18 U. S. C. A., §334); *State* v. *McKee* (1900) 73 Conn. 18, 46 Atl. 409 (identical with instant statute), cited in *Gitlow* v. *New York*, 268 U. S. 652, 667; *Strohm* v. *People* (1896) 160 Ill. 582, 43 N. E. 622].

The cases upon which appellant relies (original brief, pp. 10, 17-20; brief on reargument, pp. 9, 27, 36, 42) all dealt with legislation having no similarity to the instant statute. The statutes in one group failed to furnish an adequate standard of guilt in that they used words incapable of ready understanding (*Lanzetta* v. *New Jersey*, 306 U. S. 451) or words relative in meaning [*United States* v. *Cohen Grocery Co.*, 255 U. S. 81; *Small* v. *American Sugar Refining Co.*, 267 U. S. 233; *Connally* v. *General Construction Co.*, 269 U. S. 385; *Champlin Refining Co.* v. *Comm.*, 286 U. S. 210; *United States* v. *Capitol Traction Co.* (1910) 34 App. D. C. 592; compare *United States* v. *Durst* (S. D. W. Va. 1945) 59 Fed. Supp. 891, 893], although the offenses created fell into no previously recognized body of law, such as indecency and obscenity, capable of supplying the necessary standard of guilt.

Those in a second group were declared invalid because, as construed, they interfered with constitutional guarantees of free expression (*Stromberg* v. *California*, 283 U. S. 359; *Herndon* v. *Lowry*, 301 U. S. 242; *Thomas* v. *Collins*, 323 U. S. 516). Under the assumption upon which this point proceeds, such cases are without application (see *supra*, p. 11).

In summary: The statute as it read at the time of the offense was readily recognizable as falling within an established body of law accepted as furnishing an adequate standard of guilt. It therefore gave fair warning and, in this respect, appellant's conviction thereunder was compatible with the Fourteenth Amendment.

POINT III

The law binding upon this Court is that declared by the Court of Appeals; the application of such controlling law to appellant as of the time of his offense presents no question under the Fourteenth Amendment [answering question 3].

We here assume that the statute as enacted was a valid exercise of state power, that it provided an adequate standard of guilt, and that no question of interference with freedom of the press is involved (see Points I and II, *supra*, pp. 7-13).

In the absence of any of those questions, the law which is binding upon this Court and which governed the act for which appellant was convicted is that declared by the Court of Appeals [see *Missouri, Kansas & Texas Ry.* v. *McCann*, 174 U. S. 580, 586; *Tullis* v. *Lake Erie & Western R. R.*, 175 U. S. 348, 353-354; *Gatewood* v. *North Carolina*, 203 U. S. 531, 541, 543; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78; *Quong Ham Wah Co.* v. *Industrial Comm.*, 255 U. S. 445, 448-449; *Pierce Oil Corp.* v. *Hopkins*, 264 U. S. 137, 139; *Knights of Pythias* v. *Meyer*, 265 U. S. 30, 32-33; *Hicklin* v. *Coney*, 290 U. S. 169, 172; *Schuylkill Trust Co.* v. *Pennsylvania*, 302 U. S. 506, 512; *Minnesota* v. *Probate Court*, 309 U. S. 270, 273; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572-574].

Moreover, even though first declared in the very case in which the conviction was had, that controlling law was constitutionally applied to appellant as of the time of his offense (*cf. Smiley* v. *Kansas*, 196 U. S. 447; *Rosenthal* v. *New York*, 226 U. S. 260; *Ross* v. *Oregon*, 227 U. S. 150; *Fox* v. *Washington*, 236 U. S. 273; *Frank* v. *Mangum*, 237 U. S. 309, 343-344; *Dorchy* v. *Kansas*, 272 U. S. 306).

There is no merit in the contention that the statute should be deemed unenforceable because prosecution thereunder is necessarily subject to that normal element of unpredictability inherent in all criminal actions, particularly under statutes dealing with the indecent and the obscene (compare appellant's original brief pp. 8-9, 17-18; brief on reargument, pp. 8-12, 13-14, with *Rosen* v. *United States*, 161 U. S. 29, 41-42; *Nash* v. *United States*, 229 U. S. 373, 376-377; *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497, 502; *United States* v. *Ragen*, 314 U. S. 513, 523-524; *Tyomies Publishing Co.* v. *United States* (C. C. A. 6th 1914) 211 Fed. 385, 388; *Coomer* v. *United States* (C. C. A. 8th 1914) 213 Fed. 1, 5-6; *Magon* v. *United States* (C. C. A. 9th 1918) 248 Fed. 201, 202-203, cert. den. 249 U. S. 618).

Nor is there merit in appellant's suggestion that the statute should be unenforceable as to him because of his failure to anticipate that the Court of Appeals would, in accordance with traditional practice, construe it to eliminate all constitutional questions (compare appellant's brief on reargument, pp. 27-28, 41-42 with *Quong Ham Wah Co.* v. *Industrial Comm.*, 255 U. S. 445, 448-449; see *United States* v. *Kirby*, 74 U. S. 482, 486-487; *Fox* v. *Washington*, 236 U. S. 273, 277; *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401; *Baender* v. *Barnett*, 255 U. S. 224, 225-226; *Schuylkill Trust Co.* v. *Pennsylvania*, 302 U. S. 506, 512; *Federation of Labor* v. *McAdory*, 325 U. S. 450, 470-471).

The Court of Appeals construed this statute in a wholly reasonable fashion, following lines plainly indicated by the context and applying previously established doctrines of indecency and obscenity law (see R. 45-6; The Statute—As Construed, *supra*, pp. 5-6; also *United States* v. *American Trucking Assns.*, 310 U. S. 534, 542-544; *Southland Co.* v. *Bayley*, 319 U. S. 44, 47; *Magon* v. *United States* (C. C. A. 9th 1918) 248 Fed. 201, 202-203, cert. den. 249 U. S. 618). The instant case therefore presents no more basis for a claim of surprise or other injury than is necessarily present in any appellate determination of a question of law, particularly in a case of first impression under a criminal statute.

Finally, even had the Court of Appeals construction provided basis for a claim of surprise or other injury, appellant's failure to present such claim to that court by motion for reargument precludes him from urging it upon this appeal (*Rosenthal* v. *New York*, 226 U. S. 260, 272).

Stromberg v. *California*, 283 U. S. 359, and *Williams* v. *North Carolina*, 317 U. S. 287, upon which appellant relies (original brief, p. 15; brief on reargument, p. 45) each involved a situation where it affirmatively appeared that the case had been submitted to the jury on an unconstitutional ground, upon which the verdict might probably have rested (see 283 U. S., at pp. 363-364, 368; 317 U. S., at pp. 290-292). No such question can here arise, since the record contains nothing to suggest that the trial court did not act in accordance with the Constitution.

The balance of the cases upon which appellant relies (see original brief, pp. 6-7, 9, 14; brief on reargument, pp. 30-33, 36-41) are, in the light of the foregoing discussion, so plainly irrelevant or distinguishable as to require no comment.

It follows that the law binding upon this Court is that declared by the Court of Appeals; and that the conviction under such controlling law, as applied to appellant as of the time of his offense, is compatible with the Fourteenth Amendment.

Conclusion

The statute as construed, the conviction thereunder, and the law declared by the Court of Appeals and applied to appellant as of the time of his offense are in all ways compatible with the Fourteenth Amendment.

The judgment appealed from should be affirmed.

Respectfully submitted,

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District Attorney
New York County

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November, 1947

APPENDIX A

Selected Article and Illustration Headings from Exhibits 4 and 5

"HEADQUARTERS DETECTIVE—TRUE CASES FROM THE POLICE BLOTTER"

Issue of June, 1940 (exhibit 4)

GIRL SLAVE to a LOVE CULT! Behind the incense, rites (and real estate) lay coiled the venomous serpent that feasted secretly on the bodies of girls and boys. The Voice—"Your body is the temple of God * * *". Mystic—there was the look of power in the doctor's face. Terror—held her. "You must not cry," he ordered, "Look into my eyes." "You Must—know your purpose and the destiny of womanhood. Are you ready?" (pp. 6, 8, 10-11).

Trailing Carolina's TOURIST CAMP KILLERS. A corpse and a dagger tie a knot that takes a year of sleuthing to untie. In Cold Blood—this knife was used to slay a friendly man (pp. 12, 14).

MURDERERS MAKE MISTAKES. THE CASE OF FRED SMALL. He wept when he heard that his wife had burned to death. But all his tears could not wash away what the fire left. "A Rag and a Bone—and hank of hair" were still there to point accusingly when the flames cooled (p. 16).

DEAD MEN TELL NO TALES. When Thieves Fall Out—Honest Men Are Apt To Find Bodies Cluttering Up The Landscape. Bullets and Blood—Undersheriff Lawrence Nieri examining the riddled bodies of two men dumped by the roadside (pp. 18-19).

CAN YOU SOLVE! THIS TRUE HEADQUARTERS DETECTIVE PHOTO MYSTERY? They found Mrs. Charles Butte bludgeoned to death in her bed * * *. Yoris

spent a long time looking at the blood spots on the bed * * *. Yoris studied a drying pool of blood by the side of the bed * * *. Blood spots on the floor next drew the attention of the detectives (pp. 22-25).

MURDER in the AIR! "The Flying Lochinvar" comes out of the west in a stolen airplane, flies away with a girl and stages America's first murder in the air. The first plane to see air murder. Victim—Carl Bivens was murdered in the cabin of his own plane (pp. 26, 29).

GIRLS' REFORMATORY. "Reform School! That was a funny name for it. If you came in there decent you left with all the vices of the underworld." If a Girl—was nice to him she got privileges. If not, then her life was hell (pp. 30, 33).

COP KILLERS DIE HARD! Romance is stained with blood as a killer stalks in Lover's Lane. The Shell—and the gun that killed a cop in Humboldt Park, in Chicago. The Killer—demonstrates how he took the life of Officer Harry Francois (pp. 36, 39).

CASE OF THE MISSING CAT! "Thou Shalt Not Kill * * *." What made this man of God break the sixth commandment of his creed? Mrs. Helen Sherwood—the "other woman" in the tragic case. This Love Nest—Was used by the philandering parson in his fall from grace (pp. 40-41, 43).

BAGGING THE BAY STATE BANDIT! He died fighting! But a brave shopkeeper's death put two savage killers in the electric chair. Cruelty—was the clue that Green (left) and St. Saveur left on every job they pulled. The Sister—of Walter St. Saveur on her way to visit him in the Charleston death house (pp. 44-46).

MURDERED MOTHER? Beatrice Cox, 35-year-old ex-school teacher, shown in San Diego hospital, where she was held after being charged with the murder of her aged mother (p. 49).

FACES MURDER CHARGE. Clyde Clarke, Jr., 15 years old, who is held on murder charges after the rape-death of a young South Haven, Michigan, mother * * * (p. 51).

STRANGLED. Mary Mills, whose strangled body was discovered by South Barre, Mass., police * * * (p. 53).

CAPTURED. Lorenzo Celline, after his capture by police. He is charged with slaying Julia Weiderman * * * on a New York street (p. 55).

DEPORTED. Captain Ivan Poderjaz waves good-bye to the U. S. A., having been deported * * *. Extradited to this country as a murder suspect, Poderjaz was tried on [a] * * * bigamy charge when no trace of the body could be found (p. 56).

BEATS CHAIR IN "PERFECT CRIME." Carl Hubert Erickson, called the "most intelligent person" ever charged with murder in Chicago, is shown with his mother before being freed by a jury * * * (p. 58).

AND SUDDEN DEATH! Nude, Beaten and—disfigured, the body of Alice Burns was found in a Los Angeles vacant lot. Six Times—the slayer sank his knife, and cruelly mutilated the face (p. 66).

Issue of August, 1940 (exhibit 5)

BARGAINS IN BODIES! **"Once you're booked—you're hooked. The only escape from the White Slave traffic is the hospital or the morgue."** "I Felt—old and jaded after taking dope." His Eyes—and his long, thin hands made me tremble in fear. I Shrieked—and tried to shout but no sound came. Savagely—like a madman he picked me up and hurled me to the bed (pp. 6-7, 9-10).

TRAIL'S END. Left Handed Cop—Thomas O'Brien shows how he drilled Pignatelli on a New York rooftop (p. 16).

ENIGMA OF THE LAUGH OF DEATH. Three ghosts still laugh and haunt the old Houck house as the hand of death ends an Oklahoma feud. Mamie Houck's Death—began a hate that put Bill Darnell behind prison bars for 30 years. At Fairfield, Okla.—The arrow indicates the spot where officers found the death car parked. Bluford Graham—escaped death in the war to find it on a peaceful road at night (pp. 22-25).

"I'LL HANG FROM THE HIGHEST HILL—for I Murdered My Mother. "I Stabbed her with the ice pick. I don't know how many times I stabbed her. Then I choked her till she stopped groaning." Black Murder—will forever haunt this charming home. Matricide—left the body of Mrs. Redding in this position. Note the cord around the neck (pp. 26-27, 29).

BANK NIGHT! The Nation's Ace Sleuths Track Down a Million Dollar Robbery. $15,000 in Loot—was taken from this bank in Needham, Mass., after one policeman was killed (pp. 30, 32-33).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 636.

MURRAY WINTERS,

Appellant,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

BRIEF OF THE AUTHORS' LEAGUE OF AMERICA, INC.—*AMICUS CURIAE.*

SIDNEY R. FLEISHER,
Attorney for Authors' League of America, Inc., Amicus Curiae.

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BRIEF OF THE AUTHORS' LEAGUE OF AMERICA, INC.—*AMICUS CURIAE.*

The Authors' League of America, Inc., files this brief by stipulation of the parties.

The Authors' League was organized in 1912. It is divided into Guilds: The Authors' Guild of approximately 1700 authors of books, stories, articles, etc.; The Dramatists' Guild of approximately 2500 playwrights; and the Radio Writers' Guild, which includes many leading writers of radio broadcasting programs, both dramatic and news. The Authors' League of America, Inc., has a total membership, exclusive of screen writers, of approximately 5363 writers.

The League is concerned in the proceeding taken here by the District Attorney which terminated in a conviction affirmed by the Appellate Division and the Court of Appeals of the State of New York (Judge Lehman, dissenting) under a statute which in our opinion is invalid as violative of constitutional rights and privileges. The Courts below seemed to recog-

nize the extreme to which the statute lends itself, but justified its affirmance of the conviction upon the belief that no District Attorney would really seek a prosecution except in flagrant cases.

This is a shadow under which our authors should not be asked to function. A law which makes it an offense to do that which the Constitution permits as of right is not to be tolerated; and it cannot be supported on the theory that the whim of no District Attorney will lead him to enforce it. True enough, the District Attorneys of our counties have never, in the sixty years of existence of the statute, found occasion to enforce the statute. This in itself is a measure of its invalidity, for reasons later shown.

It is clear that the "Obscenity Statute", Subdivision 1 of Section 1141, of the Penal Law, is a thing separate and apart from Subdivision 2, under which this conviction was had. Subdivision 2 makes it a misdemeanor for any person to publish, sell, lend or make a gift of, or have in his possession for such purpose any book or other printed paper "devoted to the publication, and principally made up of criminal news, public reports or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime * * *".

The statute forbids the publication of news of the day if it consists of criminal news, public reports or accounts of criminal deeds; and it forbids the publication and sale of so-called detective and Western stories if they relate to criminal deeds or stories of deeds of bloodshed or crime.

The Appellate Division said of this statute:

> "It is aimed exclusively at printed matter which presents tales of bloodshed, crime or lust in a

manner that would have a tendency to demoralize its readers and would be likely to corrupt the morals of the young and lead them to immoral acts" (fol. 167).

Where is that stated in the statute? Where is there anything in the statute as to the manner in which the printed material is presented? Again it is said in the opinion that "the prosecution readily concedes" that the statute does not seek to suppress recognized literature including practically all detective and Western stories (fol. 167). Nothing of the sort appears in the statute, nor does the concession of the prosecuting attorney of one of our counties have any binding effect on anybody, including himself and his successor in office. Under the statute as written, no attorney may advise a client that he may safely proceed to write, edit, or publish, or sell, or lend, or give away any of the detective and Western stories and books if such book contains stories of deeds of bloodshed or crime. It would be no consolation that once a District Attorney in New York County said that the law does not mean what it says, and that such writings may be considered as free of the fear of prosecution.

POINT I.

The freedom of the press is restricted by the statute here invoked.

It may be conceded that many books and stories in violation of the statute have been written, published, loaned and given away without any prosecution or any threat of it, but that cannot constitute any reason

for the support of the statute if it is, on its face, unconstitutional.

Mr. Justice Murphy said, in *Thornhill* v. *State of Ala.*, 310 U. S. 88, at page 97:

> "Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas. *Schneider* v. *State*, 308 U. S. 147, 162-165, 60 S. Ct. 146, 151-152, 84 L. Ed. 155; *Hague* v. *C. I. O.*, 307 U. S. 496, 516, 59 S. Ct. 954, 964, 83 L. Ed. 1423; *Lovell* v. *Griffin*, 303 U. S. 444, 451, 58 S. Ct. 666, 668, 82 L. Ed. 949."

and again:

> "It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. See *Near* v. *Minnesota*, 283 U. S. 697, 51 S. Ct. 625, 630, 75 L. Ed. 1357. One who might have had a license for the asking may therefore call into question the whole scheme of licensing when he is prosecuted for failure to procure it. *Lovell* v. *Griffin*, 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949; *Hague* v. *C. I. O.*, 307 U. S. 496, 59 S. Ct. 954, 83 L. Ed. 1423. A like threat is inherent in a penal statute, like that in question here, which does not aim specifically at evils within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press."

The Court further said that the existence of such a statute, which lends itself to harsh and discriminatory enforcement by local prosecuting officials, results in restraint on all freedom of discussion and might reasonably be regarded as within the purview of the statute.

Nor is it important in the consideration of the question here whether or not the books which were found in Mr. Winters' cellar were less than we like to consider as good literature to circulate among the public. If the books were obscene or otherwise within the condemnation of Subdivision 1 of the Section, prosecution should have been under that part of the statute. If the statute is invalid on its face it cannot be sustained despite its manifest abridgement of the freedom of speech upon the ground that the defendant is not entitled to sympathy. As was said in the *Thornhill* case, *supra*, page 98:

> "Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression. *Stromberg* v. *California*, 283 U. S. 359, 368, 51 S. Ct. 532, 535, 75 L. Ed. 1117, 73 A. L. R. 1484; *Schneider* v. *State*, 308 U. S. 147, 155, 162, 163, 60 S. Ct. 146, 151, 84 L. Ed. 155. Compare *Lanzetta* v. *New Jersey*, 306 U. S. 451, 59 S. Ct. 618, 83 L. Ed. 888."

The Court below said:

> "That such publications tend to demoralize the minds of their more impressionable readers cannot be doubted" (fol. 163).

Here, both the Court and the District Attorney fall into the error of adopting a long since abandoned doctrine. In 1868 in an English court, it was said:

> "An obscene book is one which has the tendency to deprave and corrupt those whose minds were open to immoral influence and into whose hands the publication might fall." *Regina* v. *Hicklin*, L. R. 3 Q. B. 360.

But an enlightened age pays a greater respect to the advancement of literature and subordinates the shielding of the moronic mind to the public good. Thus Judge Learned Hand in *United States* v. *Levine*, 83 Fed. 2nd 156, 157, said:

> "This earlier doctrine necessarily presupposed that the evil against which the statute is directed so much outweighs all interests of art, letters or science, that they must yield to the mere possibility that some prurient person may get a sensual gratification from reading or seeing what to most people is innocent and be delightful or enlightening. No civilized community not fanatically puritannical would tolerate such an imposition, and we do not believe that the courts that have declared it, would ever have applied it consistently. * * *"

This was spoken of matter claimed to be obscene, but clearly the doctrine could as well apply to material said to demoralize certain "impressionable readers".

In the opinion of the Appellate Division below *People* v. *Gitlow*, 234 N. Y. 132, was quoted from and reference was made to that portion of the opinion which held without the constitutional privileges, those who publish articles which tend to corrupt morals, induce crime, etc. The conviction in that case was of

the crime of criminal anarchy and not of the publication of stories of crime. There was forbidden the printing, publishing, etc., of printed matter advertising that organized government should be overthrown by force, violence or any unlawful means. Section 121 Penal Law.

In *Lovell* v. *City of Griffin, Ga.*, 303 U. S. 444, a city ordinance which prohibited distribution of literature within the city limits was held invalid because it included literature in the widest sense. That ordinance, as the statute here, might indeed have been used or overlooked by the authorities, as they may have judged any given bit of literature to be good or bad according to their own views. The Court said that legislation of the type of the ordinance would restore the system of license and censorship in its baldest form; something against which the struggle for the freedom of the press was primarily directed.

Bridges v. *California*, 314 U. S. 252, presents much that is helpful in the consideration of this act.

It is already established that before there can be denial of speech guaranteed in the First and Fourteenth Amendments of the Federal Constitution and Section 8 of Article I of the Constitution of the State of New York, there must appear to be a clear and present danger that the words which are to be prohibited will bring about the substantive evils that Congress (or the Legislature) has a right to prevent. *Schenck* v. *United States*, 297 U. S. 47.

In the *Bridges* case the Court said (p. 262) that the "clear and present danger" language of the *Schenck* case has afforded a practical guidance in a great variety of cases in which the scope of constitutional

protection of freedom of expression was an issue. It has been utilized in passing on the constitutionality of convictions under the Espionage Acts, *Schenck* v. *U. S., supra*; under a Criminal Syndicalism Act, *Whitney* v. *California*, 274 U. S. 357; under an Anti-Insurrection Act, *Herndon* v. *Lowry*, 301 U. S. 242; and for breach of peace at common law, *Cantwell* v. *Connecticut*, 310 U. S. 296.

In the *Bridges* case (p. 262) it was said:

> "Moreover the likelihood, however great, that a substantive evil will result, cannot alone justify a restriction upon freedom of speech or the press. The evil itself must be 'substantive'. Brandeis, J., concurring in *Whitney* v. *California, supra*, 274 U. S. at page 374, 47 S. Ct. at page 647, 71 L. Ed. 1095; it must be 'serious', Id., 274 U. S. at page 376, 47 S. Ct. at page 648, 71 L. Ed. 1095. And even the expression of 'legislative preferences or beliefs' cannot transform minor matters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression. *Schneider* v. *State*, 308 U. S. 147, 161, 60 S. Ct. 146, 151, 84 L. Ed. 155."

The Court said further that what finally emerges from the "clear and present danger" rule is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished (p. 263). And again, at page 263:

> "Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of

Rights. For the First Amendment does not speak equivocally.

"It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."

Now contrast this guiding principle with what has been done here. There must be not merely a likelihood that an evil will result, but there must be a clear and present danger that a substantive and serious evil will result. In 1884 Section 1141, Subdivision 2, was enacted. So far as can be ascertained, in the intervening sixty years there has been not a single prosecution based upon it. How, then, can it be supported as preventing a clear and present danger of a substantive and serious evil?

A book was recently issued, edited by one Boucher with a foreword or introduction by Lewis E. Lawes, formerly the Warden of Sing Sing Prison. The book is referred to on its front cover as containing "Classic Accounts of Famous Murders". The first story in the book is of the murder of Cain by Abel. Others relate to famous murders from the 17th Century to the present day—that of La Voicin in 1675; the trial of Eugene Aram in 1745; the murder of Cecilia Rogers; of the Bender Family; of James Maybrick; of Caesar Young; etc. Many of these stories are by authors of high standing: The Earl of Birkenhead, Oscar Wilde, William Bolitho, Alexander Woollcott, etc. It will be said that it is absurd to say that the statute was intended for a book like this or for authors of such standing. Upon no such slender thread, however, may

the statute be supported. It unqualifiedly forbids publication and circulation of books or stories of precisely the nature referred to, and under it, it would be illegal to publish and circulate any criminal reports whatever, however deep and wholesome the public interest may be. In the *Bridges* case certain publishers had commented in their newspapers upon proceedings or prospective proceedings during the trial of a case, and it was said that they were guilty of contempt of court in so publishing. The following comments of the Court have unique applicability here:

> "No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression."

There a restriction upon printed discussion of a pending case was held unlawful because such discussion is constitutionally protected; such a discussion in New York State, if it included a story of the crime involved in such pending case, would be unlawful by statute.

Upon what sort of irregular and disorderly basis are the authors and publishers to proceed under the present status of the law? Here is a statute which makes it illegal to do that which seems innocent enough and which indeed has been done for over sixty years by hundreds of innocent law breakers. Now it is said that they have nothing to fear if the District Attorney does not choose to consider their work within the statute and that really the statute was only intended to apply to works which present tales of crime, etc., in a certain manner. Vagueness in criminal statutes is not to be allowed.

This defendant is directly affected by the statute and is not in the class of the supposititious physician

referred to in *People* v. *Sanger*, 222 N. Y. 192 and *People* v. *Wolf*, 220 App. Div. 71, apparently relied on by the appellee.

We wish to call the attention of this Court to the dissenting opinion of Judge Lehman of the Court of Appeals. He states:

> "The statute, as construed by the Court, is so vague and indefinite as to permit punishment of the fair use of freedom of speech (*Stromberg* v. *California*, 283 U. S. 359)."

It is a fair deduction from the majority opinion of the Court that the publication of any crime book or magazine under the statute would involve risk. The construction of the statute in this case would leave an author or publisher in doubt as to whether a volume or magazine would ultimately be held to be within the meaning of the statute. A penal statute must be sufficiently explicit to inform those subject to it what conduct will render them liable for its penalties.

This Court in *Connally* v. *General Construction Co.*, 269 U. S. 385, 391, held:

> "that the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common knowledge must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

International Harvester Co. v. *Kentucky*, 234 U. S. 216, 221; *Collins* v. *Kentucky*, 234 U. S. 634. The Court at pages 392-393 quoted with approval from the case of *United States* v. *Capital Traction Co.*, 34 App. D. C. 592, 19 Ann. Cas. 68:

> "* * * 'The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another'."

The affirmance of the conviction was clearly motivated by the condemnation of the books found in the possession of Mr. Winters; but, said the Court, the statute is not aimed at publications dealing with crime news as an incident to the legitimate purposes of science or literature (fol. 166). Then the author and the publisher must, at their peril, determine the limitations of the law. The ordinary crime story or detective story circulates freely and is not disturbed. A little more detail of the crime, the addition of a sentence or two, might make the story lurid and then perhaps would come an indictment. With obscene publications or those advocating anarchy or other

properly condemned publications, it is right that the author or publisher must act at his peril, for there are general standards of morals and decencies of the day which furnish an adequate guide to any honest man. But literature based on public reports or stories of crime have no inherent basis of anything that is wrong or illegal or immoral as the obscene or revolutionary writings would have. No reasonable person ought to be required to delve into the law books to check whether it is unlawful to do what seems so inherently right, and in particular when he is shielded by the protection of constitutional guarantees.

POINT II.

The statute should be declared invalid because of its infringement of constitutional rights.

Respectfully submitted,

SIDNEY R. FLEISHER,
Attorney for Authors' League of America, Inc., Amicus Curiae.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. [redacted] 33

MURRAY WINTERS,

Appellant,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

BRIEF OF THE NEW YORK CITY COMMITTEE OF THE AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE.

EMANUEL REDFIELD,
OSMOND K. FRAENKEL,
MORRIS L. ERNST,
Counsel, New York City Committee,
American Civil Liberties Union.

March 15, 1946.

THE COURT PRESS, N. Y. C.

INDEX.

TABLE OF CASES CITED:

OTHER AUTHORITIES CITED:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 636.

MURRAY WINTERS,

Appellant,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

BRIEF OF THE NEW YORK CITY COMMITTEE OF THE AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE.

By stipulation of counsel this brief is submitted because of the important questions of constitutional law arising in this appeal.

The appellant was convicted by a Court of Special Sessions of the City of New York on charges of possessing with intent to sell, lend, give away and show certain magazines in violation of Sub. 2 of Section 1141 of the Penal Law of the State of New York which prohibits the publication or distribution of publications devoted to stories of crime, bloodshed or lust, but was acquitted on the charge of having sold obscene literature (R. 5, 22, 23). The appellant at the trial raised the constitutionality of that subdivision of the statute as being an infringement of his right of freedom of speech. The justices found him guilty (R.

23, 29, 30, 33). The Appellate Division affirmed the conviction and held the statute to be constitutional (R. 37). The Court of Appeals affirmed the judgment but with a dissent by the Chief Judge (R. 49) the remittitur was amended to indicate that the Court below necessarily passed upon a federal question that was raised (R. 43).

This brief addresses itself to the constitutionality of the statute on its face and as applied to this defendant.

The Interest of the American Civil Liberties Union.

The New York City Committee of the American Civil Liberties Union is a local organization whose members are citizens of the State of New York and are residents of New York City. In the course of its existence of over twenty years, it has sought to protect the public from arbitrary, narrowminded censorship. It has always maintained that freedom of speech is one of the most precious rights of civilized persons toward the attainment of truth and that censorship is detrimental to such aims. It maintains that the restriction on that right is only justifiable under the most perilous circumstances and when the peril is imminent. It believes that small inroads into that right become eventually large breaches.

Consequently, it believes it important that statutes which infringe that right be held unconstitutional regardless of the merit or the taste of the particular publication under scrutiny.

The publication under scrutiny here while not choice literature for the highest cultural tastes, nevertheless, may appeal to some. It may be even a useful medium for conveying the information contained in it to some who would not otherwise select another medium. In

this respect it is no different from many daily newspapers or tabloids current in New York. The attack on this small publication is in principle an attack on vaster publications.

POINT I.

Section 1141, Sub. 2 of the Penal Law is unconstitutional as in violation of the Fourteenth Amendment of the Federal Constitution.

A.

Section 1141, Sub. 2 of the Penal Law of the State of New York is violative of freedom of speech and press contrary to the Fourteenth Amendment of the Federal Constitution.

Section 1141, Sub. 2 reads as follows:

"A person * * * who * * *

2. "Prints, utters, publishes, sells, lends, gives away or shows, or has in his possession with intent to sell, lend, give away or show, or otherwise offers for sale, loan, gift or distribution, any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime; * * *

Is guilty of a misdemeanor, and, upon conviction, shall be sentenced to not less than ten days nor more than one year imprisonment or be fined not less than fifty dollars nor more than one thousand dollars or both fine and imprisonment for each offense."

It should be noted at the outset that appellant was convicted not for obscenity, but for the distribution of a publication devoted to stories of crime, bloodshed and lust (R. 3, 4, 5, 24, 30, People's Exs. 4 and 5).

The statute under consideration operates to prohibit or restrict the publication and sale of any form of literature which is made up principally of criminal news or stories of deeds of bloodshed, lust or crime. The effect of this interdiction is to deny publication to many literary forms. For instance most newspapers would fall within the prohibition. Most newspapers devote many columns to stories of crime, bloodshed and lust. In a war stories of bloodshed receive front page attention.

Literature of all forms deals with conflict. There is no better and effective medium for portraying conflict than in stories of crime, bloodshed and lust. The dramas of Shakespeare, the stories of the Bible and contemporary publications are full of gory details, full of crime and passion. The law reports, texts, the opinions of justices of this Court teem with matter prohibited by this section of the Penal Law. Should their publishers answer before a criminal tribunal?

It might be urged that People's Exhibits 4 and 5 (the ones upon which this appellant was convicted) cannot be classified with the literary forms given as illustration. It is submitted, however, that any differences are those of taste. The statute reaches both types.

It will be conceded that the literature in *Near* v. *Minnesota*, 283 U. S. 697, 724, was not to be ranked with Shakespeare or the Bible, yet there the Court struck down the statute. That case is very apposite to the one at bar and need be carefully considered.

In the *Near* case the statute provided that any person engaged in the business of regularly or customarily producing, publishing or circulating, having in possession, selling or giving away "a malicious, scandalous and defamatory newspaper, magazine or other periodical," was guilty of a nuisance and that all persons guilty of such a nuisance might be enjoined by action by the Attorney-General. Disobedience of the injunction was punishable by contempt by fine of not more than $1,000.00 or by imprisonment for not more than twelve months.

An injunction action was brought to enjoin the defendants from publishing a "malicious, scandalous and defamatory" newspaper, magazine and periodical published by the defendants. The complaint charged that the defendants on nine different dates published and circulated editions of that periodical which were "largely devoted to malicious, scandalous and defamatory articles" concerning several persons, Jews, members of a Grand Jury and other persons. Several of the persons were public officials.

This Court nullified the statute as violative of freedom of speech. The Court found that without question the publication was scurrilous, defamatory and a vicious attack upon the character of the persons involved. Yet the Court weighed the effect of censorship on one hand as against the freedom to publish matter of public interest on the other. The choice was made against censorship. The citizen against whom the charges were made was relegated to his remedy of an action for libel.

Thus, even a statute which had the beneficial purpose to protect the good name of persons was voided because it was better that freedom of publication should be tied to as few restrictions as possible.

That the right of freedom of speech is not absolute is a familiar observation. The restriction upon it however has been applied only "in order to protect the State from destruction or from serious injury, political, economical or moral." But even then the restriction has been applied only where the speech would produce a clear or imminent danger of evil which the State has the right to protect. *Schenck* v. *United States*, 249 U. S. 47, 52; *Whitney* v. *California*, 274 U. S. 357, 373; *Gitlow* v. *New York*, 268 U. S. 652, 668-671; *Herndon* v. *Lowry*, 301 U. S. 242; *Bridges* v. *California*, 314 U. S. 252; *Hartzel* v. *United States*, 322 U. S. 680.

As recently as 1936 in the *Herndon* case Justice Roberts said, page 258:

> "The power of a State to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state."

Mr. Justice Brandeis gave the reasons for the limitation upon the legislature in his concurring opinion in the *Whitney* case (274 U. S. at p. 372). Its eloquence is a temptation to set it forth *in extenso* here. But brevity requires its incorporation by reference. His argument is that those who fought for our independence valued liberty as both a means and an end; that liberty is necessary for courage and for happiness; that liberty to think and to speak are indis-

pensable to the discovery of truth; that in this search for truth there are always risks, but there is no reason why there should be a witch hunt just because there is a fear of somebody's utterances. It is only when serious evil will imminently result from the freedom is there justification from suppression.

In the light of the foregoing, the case before this Court should now be considered. This case is analogous to the *Near* case. There the Court was concerned not with the title or superficial appearances of the statute. It addressed itself to the operation and effect of the statute. It found it to be a suppression of freedom of speech although on its face it was intended as an anti-defamation statute.

Here, we must treat the statute in the same way. On its face it is intended to improve the cultural tastes of the community by prohibiting the indulgence in a taste for stories of crime, bloodshed and lust. But it is a sword of Damocles over the freedom of the press. Its menace is more extensive here than in the *Near* case. There the effect of the suppression was to restrict one's right to criticize another. Here, the statute's ambit covers almost the entire field of literary effort. It requires no citation or statistics to note that much literary effort, and particularly that of newspapers and magazines have for their core stories of crime, lust and bloodshed. This makes the evil of this statute greater than the one in the *Near* case.

Only recently in *Hannegan* v. *Esquire, Inc.*, No. 399, October Term, 1945, this Court said:

> "Under our system of government there is an accommodation for the widest varieties of tastes and ideas. What is good literature, what has

> educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another."

This statute on its face limits that freedom of choice.

B.

Suppression, it has been demonstrated, is justifiable only when it is shown there is imminent peril to the State. Where in the record is there any evidence that in 1943, the year of this prosecution, was New York endangered in its political, economic or moral aspects by this publication? Even if judicial notice of conditions in 1943 is permissible wherein lies the imminent danger of this publication? It is as innocuous as any other literature devoted to similar stories, whether in newspapers or magazines. It must be remembered that the counts charging the appellant with possessing for distribution of an obscene publication were dismissed (R. 22, 23).

Therefore, the test of imminent danger to the State has not been met.

This is not a case like *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, where "fighting words" were used and an immediate breach of the peace was probable.

The statute even as applied to this defendant is therefore unconstitutional. *Dahnke-Walker* v. *Bouduraut*, 257 U. S. 282; *Whitney* v. *California*, *supra*, at page 378.

C.

It should be noticed also that this defendant is charged with possessing a publication for purpose of distribution which is made up of stories of crime, bloodshed and lust. There is no proof in the record or in the determination of the justices in the Court below as to which vice it ascribed this publication. Was it one devoted to stories of crime? Or was it devoted to stories of bloodshed? Or was it devoted to stories of lust? The problem this poses is as follows: Assuming the statute is constitutional as to stories of lust, but not as to stories of bloodshed or crime, what is the disposition of the appeal? There must be a reversal, because as was held in *Williams v. North Carolina*, 301 U. S. 561, when the record does not show on what theory the conviction was had and one of the grounds of the conviction is unconstitutional the judgment cannot be sustained. See also *Stromberg v. California*, 283 U. S. 359, 368.

D.

The Appellate Division (R. 39) stated: "Publications dealing with crime news as an incident to the legitimate purposes of science and literature are not prohibited. Moreover, as the prosecutor readily concedes, the statute does not seek to suppress 'a large class of recognized literature, including practically all detective and western stories and books'."

There is nothing in the statute that makes any such exceptions. The statute is the source of our information. The statute *without exception* condemns literature of the type enumerated. It says nothing as to excepted literature as "recognized" or of any traditional type.

Yet on the premise that the literature involved in this prosecution is not of the traditional variety or written by famous men that the Court affirmed the conviction.

The Appellate Division's observation that the statute does not reach literature which has crime reports only as an incident of its news publication unfolds the difficulties of the statute. Assuming that the reading of the statute by the Appellate Division is correct the question still remains as to how it is to be determined whether literature has crime as an incident only. There is no measure or means set forth in the statute by which such determination can be made or any standard fixed. Nor is it possible to rationally calculate the means by which such conclusion can be arrived at.

The opinion of the Court of Appeals follows the same pattern as the Appellate Division.

It interprets Section 2 not as applying to obscenity, but to "indecency," stating that collections of stories devoted to crime, lust and bloodshed can incite depravity, without any sexual implications. Assuming there is such a causal connection nevertheless, the statute is not directed against a collection of stories of crime, bloodshed and lust, but is written in the disjunctive. In other words, a publication principally devoted to crime without any bloodshed or lust would come under the prohibition of the statute (R. 46).

The Court of Appeals then states that the statute does not operate to define a crime after a prosecution is begun and a judicial decision is rendered. The Court said that the publisher may ascertain in advance whether a publication is "indecent" by the experience of the community, and that in any event, any risk of guessing to which a publisher is put is part of the many instances in the law where a man must estimate

correctly. To this Chief Judge Lehman dissented because he felt that the cases where "indecency" is not considered vague are those where there had been prior judicial definition. By this it is assumed he meant those cases dating back to the early common law, and subsequent judicial interpretations. But in this case he felt the statute standing by itself would place upon a publisher the choice of being a prophet or failing in that be adjudged a criminal.

As was stated in the *Lanzetta* case, 306 U. S. 451, citing *Connally v. General Construction Co.*, 269 U. S. 385, 391: "The terms of a *new* offense must be sufficiently explicit".

The emphasis is on the word "new", since such statute lacks the judicial definition, Judge Lehman referred to. The statute in the instant case is such a *new* offense. Although it has long been on the books, it nevertheless was not used and was never before interpreted.

We, therefore, come back to the original argument made in this brief that the restraint of publication must be justified upon an imminent danger that should be remedied by suppression. The Appellate Division (R. 38) rested its findings that there is such a danger because, "such publications tend to demoralize the minds of their more impressionable readers."

It is submitted, however, that this is the nub of the contention—that the literature here is not of such danger. In this connection it must be recalled that the accusation here is not that of obscenity. That charge was dismissed. If the obscenity feature of the charge is removed then there is no danger from such publication. It was obscenity that the statute aimed at in its entirety. What is left is a publication

that would appeal to those who have different tastes from the defendant's accusers.

If the publication is not obscene what immediate danger to public morality is there that requires suppression? There is none.

POINT II.

The statute is indefinite and therefore void.

The statute, subdivision 2 tried to encompass too much in its attempts at cultural improvement. It therefore used general terms and vague ones. What is a story devoted to crime, or to bloodshed or to lust? How much of the story need contain such data to make it "principally made up"? How many lines? Is it the theme that is prohibited, or is it the method of presentation? The statute gives no definitions, nor clarification. The subject thus takes within its scope almost every form of activity—every type of human activity.

These few examples by no means exhaustive illustrate the difficulties created by the vagueness. A person cannot tell from reading the statute whether his action will be criminal, and a writer or publisher acts at his peril.

The vagueness and indefiniteness of a criminal statute renders it void. *Herndon* v. *Lowry*, 301 U. S. 242, 261; *Lanzetta* v. *New Jersey*, 306 U. S. 451.

The statute is so vague and indefinite that this defendant has a right to challenge it if only because it is vague and indefinite. A citizen has a right to demand that the positive commands of a statute be set forth with such reasonable certainty that he can

guide his actions by them. He is not required at his peril to guess at the meaning of a law so vague.

Chief Judge Lehman in his dissent recognized the vice of the statute as to its vagueness. He did not share the opinion of his associates who took the view that the statute defined the conduct that was proscribed through the *mores* of the community. He felt that the law is uttered through the Legislature and when it is so done it should clearly define its limits.

POINT III.

The judgment of conviction should be reversed, and the information dismissed.

Respectfully submitted,

EMANUEL REDFIELD,
OSMOND K. FRAENKEL,
MORRIS L. ERNST,
Counsel, New York City Committee,
American Civil Liberties Union.

March 15, 1946.

Frankfurter J p. 2

SUPREME COURT OF THE UNITED STATES

No. 3.—October Term, 1947.

Murray Winters, Appellant, v. The People of the State of New York.	Appeal from the Court of Special Sessions of the City of New York, State of New York.

[March 29, 1948.]

Mr. Justice Reed delivered the opinion of the Court.

Appellant is a New York City bookdealer, convicted, on information,[1] of a misdemeanor for having in his possession with intent to sell certain magazines charged to violate subsection 2 of § 1141 of the New York Penal Law. It reads as follows:

"§ 1141. Obscene prints and articles

1. A person . . . who,

2. Prints, utters, publishes, sells, lends, gives away, distributes or shows, or has in his possession with

[1] The counts of the information upon which appellant was convicted charged, as the state court opinions show, violation of subsection 2 of § 1141. An example follows:

"Fourth Count

"And I, the District Attorney aforesaid, by this information, further accuse the said defendant of the Crime of Unlawfully Possessing Obscene Prints, committed as follows:

"The said defendant, on the day and in the year aforesaid, at the city and in the county aforesaid, with intent to sell, lend, give away and show, unlawfully did offer for sale and distribution, and have in his possession with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent and disgusting magazine entitled 'Headquarters Detective, True Cases from the Police Blotter, June 1940,' the same being devoted to the publication and principally made up of criminal news, police reports, and accounts of criminal deeds, and pictures and stories of deeds of bloodshed, lust and crime."

intent to sell, lend, give away, distribute or show, or otherwise offers for sale, loan, gift or distribution, any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime; . . .

. . . . . .

Is guilty of a misdemeanor, . . ."

Upon appeal from the Court of Special Sessions, the trial court, the conviction was upheld by the Appellate Division of the New York Supreme Court, 268 App. Div. 30, whose judgment was later upheld by the New York Court of Appeals. 294 N. Y. 545.

The validity of the statute was drawn in question in the state courts as repugnant to the Fourteenth Amendment to the Constitution of the United States in that it denied the accused the right of freedom of speech and press, protected against state interference by the Fourteenth Amendment. *Gitlow* v. *New York*, 268 U. S. 652, 666; *Pennekamp* v. *Florida*, 328 U. S. 331, 335. The principle of a free press covers distribution as well as publication. *Lovell* v. *City of Griffin*, 303 U. S. 444, 452. As the validity of the section was upheld in a final judgment by the highest court of the state against this constitutional challenge, this Court has jurisdiction under Judicial Code § 237 (a). This appeal was argued at the October 1945 Term of this Court and set down for reargument before a full bench at the October 1946 Term. It was then reargued and again set down for further reargument at the present term.

The appellant contends that the subsection violates the right of free speech and press because it is vague and indefinite. It is settled that a statute so vague and indefinite, in form and as interpreted, as to per-

mit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment. *Stromberg* v. *California*, 283 U. S. 359, 369; *Herndon* v. *Lowry*, 301 U. S. 242, 258. A failure of a statute limiting freedom of expression to give fair notice of what acts will be punished and such a statute's inclusion of prohibitions against expressions, protected by the principles of the First Amendment, violates an accused's rights under procedural due process and freedom of speech or press. Where the alleged vagueness of a state statute had been cured by an opinion of the state court, confining a statute punishing the circulation of publications "having a tendency to encourage or incite the commission of any crime" to "encouraging an actual breach of law," this Court affirmed a conviction under the stated limitation of meaning. The accused publication was read as advocating the commission of the crime of indecent exposure. *Fox* v. *Washington*, 236 U. S. 273, 277.

We recognize the importance of the exercise of a state's police power to minimize all incentives to crime, particularly in the field of sanguinary or salacious publications with their stimulation of juvenile delinquency. Although we are dealing with an aspect of a free press in its relation to public morals, the principles of unrestricted distribution of publications admonish us of the particular importance of a maintenance of standards of certainty in the field of criminal prosecution for violation of statutory prohibitions against distribution. We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society

in these magazines, they are as much entitled to the protection of free speech as the best of literature. Cf. *Hannegan* v. *Esquire*, 327 U. S. 146, 153, 158. They are equally subject to control if they are lewd, indecent, obscene or profane. *Ex parte Jackson*, 96 U. S. 727, 736; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568.

The section of the Penal Law, § 1141 (2), under which the information was filed is a part of the "indecency" article of that law. It comes under the caption "Obscene prints and articles." Other sections make punishable various acts of indecency. For example, § 1141 (1), a section not here in issue but under the same caption, punishes the distribution of obscene, lewd, lascivious, filthy, indecent or disgusting magazines.[2] Section 1141 (2) originally was aimed at the protection of minors from the distribution of publications devoted principally to criminal news and stories of bloodshed, lust or crime.[3] It was later broadened to include all the population and other phases of production and possession.

Although many other states have similar statutes, they, like the early statutes restricting paupers from changing residence, have lain dormant for decades. *Edwards* v. *California*, 314 U. S. 160, 176. Only two other state courts, whose reports are printed, appear to have con-

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[2] § 1141. . . . 1. A person who sells, lends, gives away, distributes or shows, or offers to sell, lend, give away, distribute, or show, or has in his possession with intent to sell, lend, distribute or give away, or to show, or advertises in any manner, or who otherwise offers for loan, gift, sale or distribution, any obscene, lewd, lascivious, filthy, indecent or disgusting book, magazine, pamphlet, newspaper, story paper, writing, paper, picture, drawing, photograph, figure or image, or any written or printed matter of an indecent character; . . .

Is guilty of a misdemeanor, . . .

[3] Ch. 380, New York Laws, 1884; ch. 692, New York Laws, 1887; ch. 925, New York Laws, 1941.

strued language in their laws similar to that here involved. In *Strohm* v. *Illinois*, 160 Ill. 582, a statute to suppress exhibiting to any minor child publications of this character was considered. The conviction was upheld. The case, however, apparently did not involve any problem of free speech or press or denial of due process for uncertainty under the Fourteenth Amendment.

In *State* v. *McKee*, 73 Conn. 18, the court considered a conviction under a statute which made criminal the sale of magazines "devoted to the publication, or principally made up of criminal news, police reports, or pictures and stories of deeds of bloodshed, lust, or crime." The gist of the offense was thought to be a "selection of immoralities so treated as to excite attention and interest sufficient to command circulation for a paper devoted mainly to the collection of such matters." Page 27. It was said, apropos of the state's constitutional provision as to free speech, that the act did not violate any constitutional provision relating to the freedom of the press. It was held, p. 31, that the principal evil at which the statute was directed was "the circulation of this massed immorality." As the charge stated that the offense might be committed "whenever the objectionable matter is a leading feature of the paper or when special attention is devoted to the publication of the prohibited items," the court felt that it failed to state the full meaning of the statute and reversed. As in the *Strohm* case, denial of due process for uncertainty was not raised.

On its face, the subsection here involved violates the rule of the *Stromberg* and *Herndon* cases, *supra*, that statutes which include prohibitions of acts fairly within the protection of a free press are void. It covers detective stories, treatises on crime, reports of battle carnage, *et cetera*. In recognition of this obvious defect, the New York Court of Appeals limited the scope by construction. Its only interpretation of the meaning of the pertinent

subsection is that given in this case. After pointing out that New York statutes against indecent or obscene publications have generally been construed to refer to sexual impurity, it interpreted the section here in question to forbid these publications as "indecent or obscene" in a different manner. The Court held that collections of criminal deeds of bloodshed or lust "can be so massed as to become vehicles for inciting violent and depraved crimes against the person and in that case such publications are indecent or obscene in an admissible sense, . . ." 294 N. Y. at 550. "This idea," its opinion goes on to say, "was the principal reason for the enactment of the statute." The Court left open the question of whether "the statute extends to accounts of criminal deeds not characterized by bloodshed or lust" because the magazines in question "are nothing but stories and pictures of criminal deeds of bloodshed and lust." As the statute in terms extended to other crimes, it may be supposed that the reservation was on account of doubts as to the validity of so wide a prohibition. The court declared: "In short, we have here before us accumulations of details of heinous wrongdoing which plainly carried an appeal to that portion of the public who (as many recent records remind us) are disposed to take to vice for its own sake." Further, the Court of Appeals, 294 N. Y. at 549, limited the statute so as not to "outlaw all commentaries on crime from detective tales to scientific treatises" on the ground that the legislature did not intend such literalness of construction. It thought that the magazines the possession of which caused the filing of the information were indecent in the sense just explained. The Court had no occasion to and did not weigh the character of the magazine exhibits by the more frequently used scales of § 1141 (1), printed in note 2. It did not interpret § 1141 (2) to punish distribution of indecent or obscene publications, in the usual sense, but that the

present magazines were indecent and obscene because they "massed" stories of bloodshed and lust to incite crimes. Thus interpreting § 1141 (2) to include the expanded concept of indecency and obscenity stated in its opinion, the Court of Appeals met appellant's contention of invalidity from indefiniteness and uncertainty of the subsection by saying, 294 N. Y. at 551,

> "In the nature of things there can be no more precise test of written indecency or obscenity than the continuing and changeable experience of the community as to what types of books are likely to bring about the corruption of public morals or other analogous injury to the public order. Consequently, a question as to whether a particular publication is indecent or obscene in that sense is a question of the times which must be determined as matter of fact, unless the appearances are thought to be necessarily harmless from the standpoint of public order or morality."

The opinion went on to explain that publication of any crime magazine would be no more hazardous under this interpretation than any question of degree and concluded, p. 552,

> "So when reasonable men may fairly classify a publication as necessarily or naturally indecent or obscene, a mistaken view by the publisher as to its character or tendency is immaterial."

The Court of Appeals by this authoritative interpretation made the subsection applicable to publications that, besides meeting the other particulars of the statute, so massed their collection of pictures and stories of bloodshed and of lust "as to become vehicles for inciting violent and depraved crimes against the person." Thus, the statute forbids the massing of stories of bloodshed and lust in such a way as to incite to crime against the person. This construction fixes the meaning of the statute for this case.

The interpretation by the Court of Appeals puts these words in the statute as definitely as if it had been so amended by the legislature. *Hebert* v. *Louisiana*, 272 U. S. 312, 317; *Skiriotes* v. *Florida*, 313 U. S. 69, 79. We assume that the defendant, at the time he acted, was chargeable with knowledge of the scope of subsequent interpretation. Compare *Lanzetta* v. *New Jersey*, 306 U. S. 451. As lewdness in publications is punishable under § 1141 (1) and the usual run of stories of bloodshed, such as detective stories, are excluded, it is the massing as an incitation to crime that becomes the important element.

Acts of gross and open indecency or obscenity, injurious to public morals, are indictable at common law, as violative of the public policy that requires from the offender retribution for acts that flaunt accepted standards of conduct. 1 Bishop, Criminal Law (9th ed.), § 500; Wharton, Criminal Law (12th ed.), § 16. When a legislative body concludes that the mores of the community call for an extension of the impermissible limits, an enactment aimed at the evil is plainly within its power, if it does not transgress the boundaries fixed by the Constitution for freedom of expression. The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement. The crime "must be defined with appropriate definiteness." *Cantwell* v. *Connecticut*, 310 U. S. 296; *Pierce* v. *United States*, 314 U. S. 306, 311. There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment.[4] The vagueness may be from uncertainty in re-

[4] *Connally* v. *General Construction Co.*, 269 U. S. 385, 391-92: "But it will be enough for present purposes to say generally that the decisions of the court upholding statutes as sufficiently certain rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those

gard to persons within the scope of the act, *Lanzetta* v. *New Jersey*, 306 U. S. 451, or in regard to the applicable tests to ascertain guilt.[8]

Other states than New York have been confronted with similar problems involving statutory vagueness in connection with free speech. In *State* v. *Diamond*, 27 New Mexico 477, a statute punishing "any act of any kind whatsoever which has for its purpose or aim the destruction of organized government, federal, state or municipal, or to do or cause to be done any act which is antagonistic to or in opposition to such organized government, or incite or attempt to incite revolution or opposition to such organized government" was construed. The court said, p. 479: "Under its terms no distinction is made between the man who advocates a change in the form of our government by constitutional means, or advocates the abandonment of organized government by peaceful methods, and the man who advocates the overthrow of our government by armed revolution, or other form of force and violence." Later in the opinion the statute was held void for uncertainty, p. 485:

> "Where the statute uses words of no determinative meaning, or the language is so general and indefinite as to embrace not only acts commonly recognized as reprehensible, but also others which it is unreasonable to presume were intended to be made criminal, it will be declared void for uncertainty."

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within their reach to correctly apply them, . . . or a well-settled common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ, . . . or, as broadly stated by Mr. Chief Justice White in *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, 92, 'that, for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded.' "

[8] *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, 89–93; *Champlin Refining Co.* v. *Corporation Commission*, 286 U. S. 210, 242; *Smith* v. *Cahoon*, 283 U. S. 553, 564.

Again in *State* v. *Klapprott*, 127 N. J. L. 395, a statute was held invalid on an attack against its constitutionality under state and federal constitutional provisions that protect an individual's freedom of expression. The statute read as follows, p. 396:

> "Any person who shall, in the presence of two or more persons, in any language, make or utter any speech, statement or declaration, which in any way incites, counsels, promotes, or advocates hatred, abuse, violence or hostility against any group or groups of persons residing or being in this state by reason of race, color, religion or manner of worship, shall be guilty of a misdemeanor."

The court said, pp. 401–2:

> "It is our view that the statute, *supra*, by punitive sanction, tends to restrict what one may say lest by one's utterances there be incited or advocated hatred, hostility or violence against a group 'by reason of race, color, religion or manner of worship.' But additionally and looking now to strict statutory construction, is the statute definite, clear and precise so as to be free from the constitutional infirmity of the vague and indefinite? That the terms 'hatred,' 'abuse,' 'hostility,' are abstract and indefinite admits of no contradiction. When do they arise? Is it to be left to a jury to conclude beyond reasonable doubt when the emotion of hatred or hostility is aroused in the mind of the listener as a result of what a speaker has said? Nothing in our criminal law can be invoked to justify so wide a discretion. The criminal code must be definite and informative so that there may be no doubt in the mind of the citizenry that the interdicted act or conduct is illicit."

This Court goes far to uphold state statutes that deal with offenses, difficult to define, when they are not en-

twined with limitations on free expression.[6] We have the same attitude toward federal statutes.[7] Only a definite conviction by a majority of this Court that the conviction violates the Fourteenth Amendment justifies reversal of the court primarily charged with responsibility to protect persons from conviction under a vague state statute.

The impossibility of defining the precise line between permissible uncertainty in statutes caused by describing crimes by words well understood through long use in the criminal law—obscene, lewd, lascivious, filthy, indecent or disgusting—and the unconstitutional vagueness that leaves a person uncertain as to the kind of prohibited conduct—massing stories to incite crime—has resulted in three arguments of this case in this Court. The legislative bodies in draftsmanship obviously have the same difficulty as do the judicial in interpretation. Nevertheless despite the difficulties, courts must do their best to determine whether or not the vagueness is of such a character "that men of common intelligence must necessarily guess at its meaning." *Connally* v. *General Constr. Co.*, 269 U. S. 385, 391. The entire text of the statute or the subjects dealt with may furnish an adequate standard.[8] The present case as to a vague statute abridging free speech involves the circulation of only vulgar magazines. The next may call for decision as to free expression of political views in the light of a statute intended to punish subversive activities.

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[6] *Omaechevarria* v. *Idaho*, 246 U. S. 343; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86.

[7] *United States* v. *Petrillo*, 332 U. S. 1; *Gorin* v. *United States*, 312 U. S. 19.

[8] *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497, 501; *Mutual Film Corp.* v. *Ohio Industrial Commission*, 236 U. S. 230, 245–46; *Screws* v. *United States*, 325 U. S. 91, 94–100.

The subsection of the New York Penal Law, as now interpreted by the Court of Appeals prohibits distribution of a magazine principally made up of criminal news or stories of deeds of bloodshed, or lust, so massed as to become vehicles for inciting violent and depraved crimes against the person. But even considering the gloss put upon the literal meaning by the Court of Appeals' restriction of the statute to collections of stories "so massed as to become vehicles for inciting violent and depraved crimes against the person . . . not necessarily . . . sexual passion," we find the specification of publications, prohibited from distribution, too uncertain and indefinite to justify the conviction of this petitioner. Even though all detective tales and treatises on criminology are not forbidden, and though publications made up of criminal deeds not characterized by bloodshed or lust are omitted from the interpretation of the Court of Appeals, we think fair use of collections of pictures and stories would be interdicted because of the utter impossibility of the actor or the trier to know where this new standard of guilt would draw the line between the allowable and the forbidden publications. No intent or purpose is required—no indecency or obscenity in any sense heretofore known to the law. "So massed as to incite to crime" can become meaningful only by concrete instances. This one example is not enough. The clause proposes to punish the printing and circulation of publications that courts or juries may think influence generally persons to commit crime of violence against the person. No conspiracy to commit a crime is required. See *Musser* v. *Utah*, No. 60, this Term. It is not an effective notice of new crime. The clause has no technical or common law meaning. Nor can light as to the meaning be gained from the section as a whole or the Article of the Penal Law under which it appears. As said in the *Cohen Grocery Company* case, *supra*, p. 89:

> "It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against."

The statute as construed by the Court of Appeals does not limit punishment to the indecent and obscene, as formerly understood. When stories of deeds of bloodshed, such as many in the accused magazines, are massed so as to incite to violent crimes, the statute is violated. It does not seem to us that an honest distributor of publications could know when he might be held to have ignored such a prohibition. Collections of tales of war horrors, otherwise unexceptionable, might well be found to be "massed" so as to become "vehicles for inciting violent and depraved crimes." Where a statute is so vague as to make criminal an innocent act, a conviction under it cannot be sustained. *Herndon* v. *Lowry*, 301 U. S. 242, 259.

To say that a state may not punish by such a vague statute carries no implication that it may not punish circulation of objectionable printed matter, assuming that it is not protected by the principles of the First Amendment, by the use of apt words to describe the prohibited publications. Section 1141, subsection 1, quoted in note 2, is an example. Neither the states nor Congress are prevented by the requirement of specificity from carrying out their duty of eliminating evils to which, in their judgment, such publications give rise.

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 3.—October Term, 1947.

Murray Winters, Appellant,
v.
The People of the State of New York.

Appeal from the Court of Special Sessions of the City of New York, State of New York.

[March 29, 1948.]

Mr. Justice Frankfurter, joined by Mr. Justice Jackson and Mr. Justice Burton, dissenting.

By today's decision the Court strikes down an enactment that has been part of the laws of New York for more than sixty years,[1] and New York is but one of

[1] The original statute, N. Y. L. 1884, c. 380, has twice since been amended in minor details. N. Y. L. 1887, c. 692; N. Y. L. 1941, c. 925. In its present form, it reads as follows:

"§ 1141. Obscene prints and articles

"1. A person . . . who,

. . . . . .

"2. Prints, utters, publishes, sells, lends, gives away, distributes or shows, or has in his possession with intent to sell, lend, give away, distribute or show, or otherwise offers for sale, loan, gift or distribution, any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime; . . .

. . . . . .

"Is guilty of a misdemeanor . . . ."

That this legislation was neither a casual enactment nor a passing whim is shown by the whole course of its history. The original statute was passed as the result of a campaign by the New York Society for the Suppression of Vice and the New York Society for the Prevention of Cruelty to Children. See 8th Ann. Rep., N. Y. Soc. for the Suppression of Vice (1882) p. 7; 9th *id.* (1883) p. 9; 10th *id.* (1884) p. 8; 11th *id.* (1885) pp. 7–8. The former organization, at least, had sought legislation covering many more types of literature and conduct. See 8th *id.* (1882) pp. 6–9; 9th *id.* (1883)

twenty States having such legislation. Four more States have statutes of like tenor which are brought into question by this decision, but variations of nicety preclude one from saying that these four enactments necessarily fall within the condemnation of this decision. Most of this legislation is also more than sixty years old. The latest of the statutes which cannot be differentiated from New York's law, that of the State of Washington, dates from 1909. It deserves also to be noted that the legislation was judicially applied and sustained nearly fifty years ago. See *State* v. *McKee*, 73 Conn. 18. Nor is this an instance where the pressure of proximity or propaganda led to the enactment of the same measure in a concentrated region of States. The impressiveness of the number of States which have this law on their statute books is reinforced by their distribution throughout the country and the time range of the adoption of the measure.[2] Cf. Hughes, C. J., in *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 399.

These are the statutes that fall by this decision:[3]

1. Gen. Stat. Conn. (1930) c. 329, § 6245, derived from L. 1885, c. 47, § 2. *

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pp. 9–12. On the other hand, in 1887, the limitation of the statute to sales, etc., to children was removed. N. Y. L. 1887, c. 692. More recently, it has been found desirable to add to the remedies available to the State to combat this type of literature. A 1941 statute conferred jurisdiction upon the Supreme Court, at the instance of the chief executive of the community, to enjoin the sale or distribution of such literature. N. Y. L. 1941, c. 925, § 2, N. Y. Code Crim. Proc. § 22–a. (The additional constitutional problems that might be raised by such injunctions, cf. *Near* v. *Minnesota*, 283 U. S. 697, are of course not before us.)

[2] We have no statistics or other reliable knowledge as to the incidence of violations of these laws, nor as to the extent of their enforcement. Suffice it to say that the highest courts of three of the most industrialized States—Connecticut, Illinois, and New York—have had this legislation before them.

[3] This assumes a similar construction for essentially the same laws.

* Since this opinion was filed, Conn. L. 1935, c. 216, repealing this provision, has been called to my attention.

2. Ill. Ann. Stat. (Smith-Hurd) c. 38, § 106, derived from Act of June 3, 1889, p. 114, § 1 (minors).

3. Iowa Code (1946) § 725.8, derived from 21 Acts, Gen. Assembly, c. 177, § 4 (1886) (minors).

4. Gen. Stats. Kans. (1935) § 21–1102, derived from L. 1886, c. 101, § 1.

5. Ky. Rev. Stat. (1946) § 436.110, derived from L. 1891–92, c. 182, § 217 (1893) (similar).

6. Rev. Stat. Maine (1944) c. 121, § 27, derived from L. 1885, c. 348, § 1 (minors).

7. Ann. Code Md. (1939) Art. 27, § 496, derived from L. 1894, c. 271, § 2.

8. Ann. Laws Mass. (1933) c. 272, § 30, derived from Acts and Resolves 1885, c. 305 (minors).

9. Mich. Stat. Ann. (1938) § 28.576, derived from L. 1885, No. 138.

10. Minn. Stat. (1945) § 617.72, derived from L. 1885, c. 268, § 1 (minors).

11. Mo. Rev. Stat. (1939) § 4656, derived from Act of April 2, 1885, p. 146, § 1 (minors).

12. Rev. Code Mont. (1935) § 11134, derived from Act of March 4, 1891, p. 255, § 1 (minors).

13. Rev. Stat. Nebr. (1943) § 28–924, derived from L. 1887, c. 113, § 4 (minors).

14. N. Y. Consol. L. (1938) Penal Law, Art. 106, § 1141 (2), derived from L. 1884, c. 380.

15. N. D. Rev. Code (1943) § 12–2109, derived from L. 1895, c. 84, § 1 (similar).

16. Ohio Code Ann. (Throckmorton, 1940) § 13035, derived from 82 Sess. L. 184 (1885) (similar).

17. Ore. Comp. L. Ann. (1940) § 23–924, derived from Act of Feb. 25, 1885, p. 126 (similar).

18. Penn. Stat. Ann. (1945) § 4524, derived from L. 1887, P. L. 38, § 2.

19. Rev. Stat. Wash. (Remington, 1932) § 2459 (2), derived from L. 1909, c. 249, § 207 (2).

20. Wis. Stat. (1945) § 351.38 (4), derived from L. 1901, c. 256.

The following statutes are somewhat similar, but may not necessarily be rendered unconstitutional by the Court's decision in the instant case:

1. Colo. Stat. Ann. (1935) c. 48, § 217, derived from Act of April 9, 1885, p. 172, § 1.

2. Ind. Stat. Ann. (1934) § 2607, derived from L. 1895, c. 109.

3. S. D. Code (1939) § 13.1722 (4), derived from L. 1913, c. 241, § 4.

4. Tex. Stat. (Vernon, 1936), Penal Code, Art. 527, derived from Acts 1897, c. 116.

This body of laws represents but one of the many attempts by legislatures to solve what is perhaps the most persistent, intractable, elusive, and demanding of all problems of society—the problem of crime, and, more particularly, of its prevention. By this decision the Court invalidates such legislation of almost half the States of the Union. The destructiveness of the decision is even more far-reaching. This is not one of those situations where power is denied to the States because it belongs to the Nation. These enactments are invalidated on the ground that they fall within the prohibitions of the "vague contours" of the Due Process Clause. The decision thus operates equally as a limitation upon Congressional authority to deal with crime, and, more especially, with juvenile delinquency. These far-reaching consequences result from the Court's belief that what New York, among a score of States, has prohibited, is so empty of meaning that no one desirous of obeying the law could fairly be aware that he was doing that which was prohibited.

Fundamental fairness of course requires that people be given notice of what to avoid. If the purpose of a statute is undisclosed, if the legislature's will has not been revealed, it offends reason that punishment should be meted out for conduct which at the time of its commission was not forbidden to the understanding of those who wished to observe the law. This requirement of fair notice that there is a boundary of prohibited conduct not to be overstepped is included in the conception of "due process of law." The legal jargon for such failure to give forewarning is to say that the statute is void for "indefiniteness."

But "indefiniteness" is not a quantitative concept. It is not even a technical concept of definite components. It is itself an indefinite concept. There is no such thing as "indefiniteness" in the abstract, by which the sufficiency of the requirement expressed by the term may be ascertained. The requirement is fair notice that conduct may entail punishment. But whether notice is or is not "fair" depends upon the subject matter to which it relates. Unlike the abstract stuff of mathematics, or the quantitatively ascertainable elements of much of natural science, legislation is greatly concerned with the multiform psychological complexities of individual and social conduct. Accordingly, the demands upon legislation, and its responses, are variable and multiform. That which may appear to be too vague and even meaningless as to one subject matter may be as definite as another subject-matter of legislation permits, if the legislative power to deal with such a subject is not to be altogether denied. The statute books of every State are full of instances of what may look like unspecific definitions of crime, of the drawing of wide circles of prohibited conduct.

In these matters legislatures are confronted with a dilemma. If a law is framed with narrow particularity, too easy opportunities are afforded to nullify the purposes of the legislation. If the legislation is drafted in terms so vague that no ascertainable line is drawn in advance between innocent and condemned conduct, the purpose of the legislation cannot be enforced because no purpose is defined. It is not merely in the enactment of tax measures that the task of reconciling these extremes—of avoiding throttling particularity or unfair generality—is one of the most delicate and difficult confronting legislators. The reconciliation of these two contradictories is necessarily an empiric enterprise largely depending on the nature of the particular legislative problem.

What risks do the innocent run of being caught in a net not designed for them? How important is the policy of the legislation, so that those who really like to pursue innocent conduct are not likely to be caught unaware? How easy is it to be explicitly particular? How necessary is it to leave a somewhat penumbral margin but sufficiently revealed by what is condemned to those who do not want to sail close to the shore of questionable conduct? These and like questions confront legislative draftsmen. Answers to these questions are not to be found in any legislative manual nor in the work of great legislative draftsmen. They are not to be found in the opinions of this Court. These are questions of judgment, peculiarly within the responsibility and the competence of legislatures. The discharge of that responsibility should not be set at naught by abstract notions about "indefiniteness."

The action of this Court to day in invalidating legislation having the support of almost half the States of the Union rests essentially on abstract notions about "indefiniteness." The Court's opinion could have been written by one who had never read the issues of "Headquarters

Detective" which are the basis of the prosecution before us, who had never deemed their contents as relevant to the form in which the New York legislation was cast, had never considered the bearing of such "literature" on juvenile delinquency, in the allowable judgment of the legislature. Such abstractions disregard the considerations that may well have moved and justified the State in not being more explicit than these State enactments are. Only such abstract notions would reject the judgment of the States that they have outlawed what they have a right to outlaw, in the effort to curb crimes of lust and violence, and that they have not done it so recklessly as to occasion real hazard that other publications will thereby be inhibited, or also be subjected to prosecution.

This brings our immediate problem into focus. No one would deny, I assume, that New York may punish crimes of lust and violence. Presumably also, it may take appropriate measures to lower the crime rate. But he must be a bold man indeed who is confident that he knows what causes crimes. Those whose lives are devoted to an understanding of the problem are certain only that they are uncertain regarding the role of the various alleged "causes" of crime. Bibliographies of criminology reveal a depressing volume of writings on theories of causation. See, *e. g.*, Kuhlman, A Guide to Material on Crime and Criminal Justice (1929) Item Nos. 292 to 1211; Culver, Bibliography of Crime and Criminal Justice (1927–1931) Item Nos. 877–1475, and (1932–1937) Item Nos. 799–1560. Is it to be seriously questioned, however, that the State of New York, or the Congress of the United States, may make incitement to crime itself an offense? He too would indeed be a bold man who denied that incitement may be caused by the written word no less than by the spoken. If "the Fourteenth Amendment does not enact Mr. Her-

bert Spencer's Social Statics," (Holmes, J., dissenting in *Lochner* v. *New York*, 198 U. S. 45, 75), neither does it enact the psychological dogmas of the Spencerian era. The painful experience which resulted from confusing economic dogmas with constitutional edicts ought not to be repeated by finding constitutional barriers to a State's policy regarding crime, because it may run counter to our inexpert psychological assumptions or offend our presuppositions regarding incitements to crime in relation to the curtailment of utterance. This Court is not ready, I assume, to pronounce on causative factors of mental disturbance and their relation to crime. Without formally professing to do so, it may actually do so by invalidating legislation dealing with these problems as too "indefinite."

Not to make the magazines with which this case is concerned part of the Court's opinion is to play "Hamlet" without Hamlet. But the Court sufficiently summarizes one aspect of what the State of New York here condemned when it says "we can see nothing of any possible value to society in these magazines." From which it jumps to the conclusion that, nevertheless, "they are as much entitled to the protection of free speech as the best of literature." Wholly neutral futilities, of course, come under the protection of free speech as fully as do Keats' poems or Donne's sermons. But to say that these magazines have "nothing of any possible value to society" is only half the truth. This merely denies them goodness. It disregards their mischief. As a result of appropriate judicial determination, these magazines were found to come within the prohibition of the law against inciting "violent and depraved crimes against the person," and the defendant was convicted because he exposed for sale such materials. The essence of the Court's decision is that it gives publications which have "nothing of any possible value to society" constitutional protection

but denies to the States the power to prevent the grave evils to which, in their rational judgment, such publications give rise. The legislatures of New York and the other States were concerned with these evils and not with neutral abstractions of harmlessness. Nor was the New York Court of Appeals merely resting, as it might have done, on a deep-seated conviction as to the existence of an evil and as to the appropriate means for checking it. That court drew on its experience, as revealed by "many recent records" of criminal convictions before it, for its understanding of the practical concrete reasons that led the legislatures of a score of States to pass the enactments now here struck down.

The New York Court of Appeals thus spoke out of extensive knowledge regarding incitements to crimes of violence. In such matters, local experience, as this Court has said again and again, should carry the greatest weight against our denying a State authority to adjust its legislation to local needs. But New York is not peculiar in concluding that "collections of pictures or stories of criminal deeds of bloodshed or lust unquestionably can be so massed as to become vehicles for inciting violent and depraved crimes against the person." 294 N. Y. at 550. A recent murder case before the High Court of Australia sheds light on the considerations which may well have induced legislation such as that now before us, and on the basis of which the New York Court of Appeals sustained its validity. The murder was committed by a lad who had just turned seventeen years of age, and the victim was the driver of a taxicab. I quote the following from the opinion of Mr. Justice Dixon: "In his evidence on the *voir dire* Graham [a friend of the defendant and apparently a very reliable witness] said that he knew Boyd Sinclair [the murderer] and his moods very well and that he just left him; that Boyd had on a number of occasions outlined plans for embarking on a life of crime,

plans based mainly on magazine thrillers which he was reading at the time. They included the obtaining of a motor car and an automatic gun." *Sinclair* v. *The King*, 73 Comm. L. R. 316, 330.

"Magazine thrillers" hardly characterizes what New York has outlawed. New York does not lay hold of publications merely because they are "devoted to and principally made up of criminal news or police reports or accounts of criminal deeds, regardless of the manner of treatment." So the Court of Appeals has authoritatively informed us. 294 N. Y. at 549. The aim of the publication must be incitation to "violent and depraved crimes against the person" by so massing "pictures and stories of criminal deeds of bloodshed or lust" as to encourage like deeds in others. It would be sheer dogmatism in a field not within the professional competence of judges to deny to the New York legislature the right to believe that the intent of the type of publications which it has proscribed is to cater to morbid and immature minds—whether chronologically or permanently immature. It would be sheer dogmatism to deny that in some instances, as in the case of young Boyd Sinclair, deeply embedded, unconscious impulses may be discharged into destructive and often fatal action.

If legislation like that of New York "has been enacted upon a belief of evils that is not arbitrary we cannot measure their extent against the estimate of the legislature." *Tanner* v. *Little*, 240 U. S. 369, 385. The Court fails to give enough force to the influence of the evils with which the New York legislature was concerned "upon conduct and habit, not enough to their insiduous potentialities." *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342, 364. The other day we indicated that, in order to support its constitutionality, legislation need not employ the old practice of preambles, nor be ac-

companied by a memorandum of explanation setting forth the reasons for the enactment. See *Woods* v. *Cloyd W. Miller Co.*, 333 U. S. 138, 144. Accordingly, the New York statute, when challenged for want of due process on the score of "indefiniteness," must be considered by us as though the legislature had thus spelled out its convictions and beliefs for its enactment:

> Whereas, we believe that the destructive and adventurous potentialities of boys and adolescents, and of adults of weak character or those leading a drab existence are often stimulated by collections of pictures and stories of criminal deeds of bloodshed or lust so massed as to incite to violent and depraved crimes against the person; and
>
> Whereas, we believe that such juveniles and other susceptible characters do in fact commit such crimes, at least partly because incited to do so by such publications, the purpose of which is to exploit such susceptible characters; and
>
> Whereas, such belief, even though not capable of statistical demonstration, is supported by our experience as well as by the opinions of some specialists qualified to express opinions regarding criminal psychology and not disproved by others; and
>
> Whereas, in any event there is nothing of possible value to society in such publications, so that there is no gain to the State, whether in edification or enlightenment or amusement or good of any kind; and
>
> Whereas, the possibility of harm by restricting free utterance through harmless publications is too remote and too negligible a consequence of dealing with the evil publications with which we are here concerned;
>
> Be it therefore enacted that—

Unless we can say that such beliefs are intrinsically not reasonably entertainable by a legislature, or that the record disproves them, or that facts of which we must take judicial notice preclude the legislature from entertaining such views, we must assume that the legislature was dealing with a real problem touching the commission of crime and not with fanciful evils, and that the measure was adapted to the serious evils to which it was addressed. The validity of such legislative beliefs or their importance ought not to be rejected out of hand.

Surely this Court is not prepared to say that New York cannot prohibit traffic in publications exploiting "criminal deeds of bloodshed or lust" so "as to become vehicles for inciting violent and depraved crimes against the person." Laws have here been sustained outlawing utterance far less confined. A Washington statute, directed against printed matter tending to encourage and advocate disrespect for law, was judged and found not wanting on these broad lines:

> "We understand the State court by implication at least to have read the statute as confined to encouraging an actual breach of law. Therefore the argument that this act is both an unjustifiable restriction of liberty and too vague for a criminal law must fail. It does not appear and is not likely that the statute will be construed to prevent publications merely because they tend to produce unfavorable opinions of a particular statute or of law in general. In this present case the disrespect for law that was encouraged was disregard of it—an overt breach and technically criminal act. It would be in accord with the usages of English to interpret disrespect as manifested disrespect, as active disregard going beyond the line drawn by the law. That is all that has happened as yet, and we see no reason to believe that the statute will be stretched beyond that point.

"If the statute should be construed as going no farther than is necessary to go in order to bring the defendant within it, there is no trouble with it for want of definiteness." *Fox* v. *Washington*, 236 U. S. 273, 277.

In short, this Court respected the policy of a State by recognizing the practical application which the State court gave to the statute in the case before it. This Court rejected constitutional invalidity based on a remote possibility that the language of the statute, abstractly considered, might be applied with unbridled looseness.

Since Congress and the States may take measures against "violent and depraved crimes," can it be claimed that "due process of law" bars measures against incitement to such crimes? But if they have power to deal with incitement, Congress and the States must be allowed the effective means for translating their policy into law. No doubt such a law presents difficulties in draftsmanship where publications are the instruments of incitement. The problem is to avoid condemnation so unbounded that neither the text of the statute nor its subject matter affords "a standard of some sort" (*United States* v. *Cohen Grocery Co.*, 255 U. S. 81, 92). Legislation must put people on notice as to the kind of conduct from which to refrain. Legislation must also avoid so tight a phrasing as to leave the area for evasion ampler than that which is condemned. How to escape, on the one hand, having a law rendered futile because no standard is afforded by which conduct is to be judged, and, on the other, a law so particularized as to defeat itself through the opportunities it affords for evasion, involves an exercise of judgment which is at the heart of the legislative process. It calls for the accommodation of delicate factors. But this accommodation is for the legislature to make and for us to respect, when it concerns a subject so clearly within the scope of the police power as the

control of crime. Here we are asked to declare void the law which expresses the balance so struck by the legislature, on the ground that the legislature has not expressed its policy clearly enough. That is what it gets down to.

What were the alternatives open to the New York legislature? It could of course conclude that publications such as those before us could not "become vehicles for inciting violent and depraved crimes." But surely New York was entitled to believe otherwise. It is not for this Court to impose its belief, even if entertained, that no "massing of print and pictures" could be found to be effective means for inciting crime in minds open to such stimulation. What gives judges competence to say that while print and pictures may be constitutionally outlawed because judges deem them "obscene," print and pictures which in the judgment of half the States of the Union operate as incitements to crime, enjoy a constitutional prerogative? When on occasion this Court has presumed to act as an authoritative faculty of chemistry, the result has not been fortunate. See *Burns Baking Co.* v. *Bryan*, 264 U. S. 504, where this Court ventured a view of its own as to what is reasonable "tolerance" in breadmaking. Considering the extent to which the whole domain of psychological inquiry has only recently been transformed and how largely the transformation is still in a pioneer stage, I should suppose that the Court would feel even less confidence in its views on psychological issues. At all events, it ought not to prefer its psychological views—for, at bottom, judgment on psychological matters underlies the legal issue in this case—to those implicit in an impressive body of enactments and explicitly given by the New York Court of Appeals, out of the abundance of its experience, as the reason for sustaining the legislation which the Court is nullifying.

But we are told that New York has not expressed a policy, that what looks like a law is not a law because it is so vague as to be meaningless. Suppose then that

the New York legislature now wishes to meet the objection of the Court. What standard of definiteness does the Court furnish the New York legislature in finding indefiniteness in the present law? Should the New York legislature enumerate by name the publications which in its judgment are "inciting violent and depraved crimes"? Should the New York legislature spell out in detail the ingredients of stories or pictures which accomplish such "inciting"? What is there in the condemned law that leaves men in the dark as to what is meant by publications that exploit "criminal deeds of bloodshed or lust" thereby "inciting violent and depraved crimes"? What real risk do the Conan Doyles, the Edgar Allen Poes, the William Rougheads, the ordinary tribe of detective story writers, their publishers, or their booksellers run?

Insofar as there is uncertainty, the uncertainty derives not from the terms of condemnation, but from the application of a standard of conduct to the varying circumstances of different cases. The Due Process Clause does not preclude such fallibilities of judgment in the administration of justice by men. Our penal codes are loaded with prohibitions of conduct depending on ascertainment through fallible judges and juries of a man's intent or motive—on ascertainment, that is, from without of a man's inner thoughts, feelings and purposes. Of course a man runs the risk of having a jury of his peers misjudge him. Mr. Justice Holmes has given the conclusive answer to the suggestion that the Due Process Clause protects against such a hazard: "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death." *Nash* v. *United States*, 229 U. S. 373, 377. To which it is countered that such uncertainty not in the standard but in its application is not objectionable in legislation having a long history, but is

inadmissible as to more recent laws. Is this not another way of saying that when new circumstances or new insights lead to new legislation the Due Process Clause denies to legislatures the power to frame legislation with such regard for the subject matter as legislatures had in the past? When neither the Constitution nor legislation has formulated legal principles for courts, and they must pronounce them, they find it impossible to impose upon themselves such a duty of definiteness as this decision exacts from legislatures.

The Court has been led into error, if I may respectfully suggest, by confusing want of certainty as to the outcome of different prosecutions for similar conduct, with want of definiteness in what the law prohibits. But diversity in result for similar conduct in different trials under the same statute, is an unavoidable feature of criminal justice. So long as these diversities are not designed consequences but due merely to human fallibility, they do not deprive persons of due process of law.

In considering whether New York has struck an allowable balance between its right to legislate in a field that is so closely related to the basic function of government, and the duty to protect the innocent from being punished for crossing the line of wrongdoing without awareness, it is relevant to note that this legislation has been upheld as putting law-abiding people on sufficient notice, by a court that has been astutely alert to the hazards of vaguely phrased penal laws and zealously protective of individual rights against "indefiniteness." See, *e. g.*, *People* v. *Phyfe*, 136 N. Y. 554; *People* v. *Briggs*, 193 N. Y. 457; *People* v. *Shakun*, 251 N. Y. 107; *People* v. *Grogan*, 260 N. Y. 138. The circumstances of this case make it particularly relevant to remind, even against a confident judgment of the invalidity of legislation on the vague ground of "indefiniteness," that certitude is not the test of certainty. If men may reasonably differ whether the State has given sufficient notice that it is

outlawing the exploitation of criminal potentialities, that in itself ought to be sufficient, according to the repeated pronouncements of this Court, to lead us to abstain from denying power to the States. And it deserves to be repeated that the Court is not denying power to the States in order to leave it to the Nation. It is denying power to both. By this decision Congress is denied power, as part of its effort to grapple with the problems of juvenile delinquency in Washington, to prohibit what twenty States have seen fit to outlaw. Moreover, a decision like this has a destructive momentum much beyond the statutes of New York and of the other States immediately involved. Such judicial nullification checks related legislation which the States might deem highly desirable as a matter of policy, and this Court might not find unconstitutional.

Almost by his very last word on this Court, as by his first, Mr. Justice Holmes admonished against employing "due process of law" to strike down enactments, which, though supported on grounds that may not commend themselves to judges, can hardly be deemed offensive to reason itself. It is not merely in the domain of economics that the legislative judgment should not be subtly supplanted by the judicial judgment. "I cannot believe that the Amendment was intended to give us *carte blanche* to embody our economic or moral beliefs in its prohibitions." So wrote Mr. Justice Holmes in summing up his protest for nearly thirty years against using the Fourteenth Amendment to cut down the constitutional rights of the States. *Baldwin* v. *Missouri*, 281 U. S. 586, 595 (dissenting).

Indeed, Mr. Justice Holmes is a good guide in deciding this case. In three opinions in which, speaking for the Court, he dealt with the problem of "indefiniteness" in relation to the requirement of due process, he indicated the directions to be followed and the criteria to be applied. Pursuit of those directions and due regard for the criteria

require that we hold that the New York legislature has not offended the limitations which the Due Process Clause has placed upon the power of States to counteract avoidable incitements to violent and depraved crimes.

Reference has already been made to the first of the trilogy, *Nash* v. *United States, supra.* There the Court repelled the objection that the Sherman Law "was so vague as to be inoperative on its criminal side." The opinion rested largely on a critical analysis of the requirement of "definiteness" in criminal statutes to be drawn from the Due Process Clause. I have already quoted the admonishing generalization that "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree." 229 U. S. at 377. Inasmuch as "the common law as to restraint of trade" was "taken up" by the Sherman Law, the opinion in the *Nash* case also drew support from the suggestion that language in a criminal statute which might otherwise appear indefinite may derive definiteness from past usage. How much definiteness "the common law of restraint of trade" has imparted to "the rule of reason," which is the guiding consideration in applying the Sherman Law, may be gathered from the fact that since the *Nash* case this Court has been substantially divided in at least a dozen cases in determining whether a particular situation fell within the undefined limits of the Sherman Law.[4] The Court's

[4] See, *e. g.*, *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32; *United States* v. *United States Steel Corp.*, 251 U. S. 417; *United States* v. *Reading Co.*, 253 U. S. 26; *American Column & Lumber Co.* v. *United States*, 257 U. S. 377; *Maple Flooring Mfrs. Assn.* v. *United States*, 268 U. S. 563; *Cement Mfrs. Protective Assn.* v. *United States*, 268 U. S. 588; *United States* v. *Trenton Potteries Co.*, 273 U. S. 392; *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208; *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150; *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533; *Associated Press* v. *United States*, 326 U. S. 1; *United States* v. *Line Material Co.*, 333 U. S. —.

opinion in this case invokes this doctrine of "permissible uncertainty" in criminal statutes as to words that have had long use in the criminal law, and assumes that "long use" gives assurance of clear meaning. I do not believe that the law reports permit one to say that statutes condemning "restraint of trade" or "obscenity" are much more unequivocal guides to conduct than this statute furnishes, nor do they cast less risk of "estimating rightly" what judges and juries will decide than does this legislation.

The second of this series of cases, *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, likewise concerned anti-trust legislation. But that case brought before the Court a statute quite different from the Sherman Law. However indefinite the terms of the latter, whereby "it throws upon men the risk of rightly estimating a matter of degree," it is possible by due care to keep to the line of safety. But the Kentucky statute was such that no amount of care would give safety. To compel men, wrote Mr. Justice Holmes "to guess on peril of indictment what the community would have given for them [commodities] if the continually changing conditions were other than they are, to an uncertain extent; to divine prophetically what the reaction of only partially determinate facts would be upon the imaginations and desires of purchasers, is to exact gifts that mankind does not possess." 234 U. S. at 223–224. The vast difference between this Kentucky statute and the New York law, so far as forewarning goes, needs no laboring.

The teaching of the *Nash* and the *Harvester* cases is that it is not violative of due process of law for a legislature in framing its criminal law to cast upon the public the duty of care and even of caution, provided that there is sufficient warning to one bent on obedience that he comes near the proscribed area. In his last opinion on this subject, Mr. Justice Holmes applied this teaching on

behalf of a unanimous Court, *United States* v. *Wurzbach*, 280 U. S. 396, 399. The case sustained the validity of the Federal Corrupt Practices Act. What he wrote is too relevant to the matter in hand not to be fully quoted:

> "It is argued at some length that the statute, if extended beyond the political purposes under the control of Congress, is too vague to be valid. The objection to uncertainty concerning the persons embraced need not trouble us now. There is no doubt that the words include representatives, and if there is any difficulty, which we are far from intimating, it will be time enough to consider it when raised by someone whom it concerns. The other objection is to the meaning of 'political purposes.' This would be open even if we accepted the limitations that would make the law satisfactory to the respondent's counsel. But we imagine that no one not in search of trouble would feel any. Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk. *Nash* v. *United States*, 229 U. S. 373."

Only a word needs to be said regarding *Lanzetta* v. *New Jersey*, 306 U. S 451. The case involved a New Jersey statute of the type that seek to control "vagrancy." These statutes are in a class by themselves, in view of the familiar abuses to which they are put. See Note, 47 Col. L. Rev. 613, 625. Definiteness is designedly avoided so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of police and prosecution, although not chargeable with any particular offense. In short, these "vagrancy statutes," and laws against "gangs" are not fenced in by the text of the

statute or by the subject matter so as to give notice of conduct to be avoided.

And so I conclude that New York, in the legislation before us, has not exceeded its constitutional power to control crime. The Court strikes down laws that forbid publications inciting to crime, and as such not within the constitutional immunity of free speech, because in effect it does not trust State tribunals, nor ultimately this Court, to safeguard inoffensive publications from condemnation under this legislation. Every legislative limitation upon utterance, however valid, may in a particular case serve as an inroad upon the freedom of speech which the Constitution protects. See, *e. g.*, *Cantwell* v. *Connecticut*, 310 U. S. 296, and Mr. Justice Holmes' dissent in *Abrams* v. *United States*, 250 U. S. 616, 624. The decision of the Court is concerned solely with the validity of the statute, and this opinion is restricted to that issue.